IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
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THOMSON REUTERS ENTERPRISE CENTRE GMBH and WEST PUBLISHING CORPORATION	:	CIVIL ACTION NO. 20-613
Plaintiffs and Counterdefendants	:	HEARING
v.	:	
ROSS INTELLIGENCE INC.	:	
Defendant and Counterclaimant.	:	

James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
December 5, 2024
Commencing at 10:00

BEFORE THE HONORABLE STEPHANOS BIBAS

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(THE DEPUTY CLERK OPENS COURT)

THE COURT: Good morning. Please sit down. All right. Madam Court Reporter, everything visible, working? Most important person in the room.

10:04:28 This is Judge Stephanos Bibas, and my designation in the District of Delaware, Civil Case 20-cv-613, Thomson Reuters Enterprise Centre GMBh, et al. vs. Ross Intelligence, Inc.

Counsel for plaintiffs, please enter your

10:04:45 appearances.

MR. FLYNN: Good morning, Your Honor. Michael Flynn for Morris, Nichols on behalf of plaintiffs.

At counsel table we have Dale Cendali,

10:04:58 Miranda Means, and Josh Simmons from Kirkland & Ellis. Behind them is Yungmoon Chang.

We also have two representatives from Thomson Reuters: Katharine Larson and Jeanpierre Giuliano.

10:05:09 THE COURT: Good morning to all of you.

And will plaintiffs be splitting this up by issue or will Ms. Cendali be taking the lead on all of them?

MS. CENDALI: Good question, Your Honor.

10:05:19 Ms. Cendali will start with the various questions, and

my partner, Joshua Simmons, will handle your other questions.

THE COURT: Okay. So that the infringement, et cetera. Okay.

10:05:35 And for defendant.

MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of defendant. Joined by my colleagues Warrington Parker, Joachim Steinberg, Keith Harrison, and Crinessa Berry.

10:05:52 And as far as the division of labor, I will let Mr. Parker speak to that.

THE COURT: Mr. Parker, how do you --

MR. PARKER: I will be taking all questions except for Number 6. Mr. Harrison will be

10:06:02 taking Number 6.

THE COURT: Number 6 being...

MR. PARKER: Undisputed facts.

THE COURT: Undisputed facts. So Mr. Harrison, undisputed facts. Okay. Got it.

10:06:14 Thank you. All right. Let's start with some logistics and scheduling. If there is a potential trial next year, we have -- we're holding the week of May 12th, but I'm wondering whether it is possible to do this earlier.

10:06:35 The Court is available for a number of

weeks and can shuffle some things around, and I would like to know what the barriers are on the parties' schedules.

So, first of all, the last week in

10:06:48 January, do parties have any conflicts that can't be moved from, say, Tuesday the 28th through Tuesday, February 4th?

MS. CENDALI: Yes, Your Honor. We have a big symposium that we organize for all our clients

10:07:11 throughout that week, which the invitations have gone out. And it's also the week right after a Ninth Circuit argument, which we would need trial prep time.

THE COURT: All right. Let's set that aside. How about the second week of March, March 11th

10:07:32 through the 14th or 17th?

MS. CENDALI: At least with regard to plaintiffs, Your Honor, we're -- maybe a path forward is for us to meet and confer about schedules and report back, because right now we have a three-week jury trial

10:07:53 in Florida in March, but, like anything else, sometimes the things, move, change, things can happen. But right now we would have a conflict.

THE COURT: Okay. You have a conflict through March. When would that likely end?

10:08:07 MS. CENDALI: It's supposed to end on the

21st, but you never know when the jury comes back.

THE COURT: Of course. Of course.

The week of April -- maybe 8th through the 15th? No, there's -- I don't remember -- I can't remember when Passover starts this year. I don't know if that conflicts with that.

MR. PARKER: I understand it's April 12th.

THE COURT: Passover is April 12th. So I don't want to put anyone in that situation.

We're holding the week of May 12th. Does the prior week, May -- the week of May 5th work for counsel?

MS. CENDALI: One of the issues with that for us, Your Honor, is at least one of our experts is out of the country and could not be there.

THE COURT: When does that expert return?

MS. CENDALI: Not until the 9th.

THE COURT: And what is that expert an expert on?

MS. CENDALI: Damages.

THE COURT: Damages expert. Okay. But that person would be back the 9th, so would be available for trial the week of the 12th.

MS. CENDALI: Yes. Yes, Your Honor.

THE COURT: All right. So let's revisit this later. It does sound like we're going to have some real difficulty making this happen before May 12th, but schedules are subject to change. If the March trial goes away, perhaps counsel could, you know, notify, talk with one another if that is a possibility. I don't know if that's -- there's an issue on Mr. Parker's calendar for -- during March.

MR. PARKER: The only dates in March currently at issue would be March 24th to March 29th.

THE COURT: Okay. So those second and third weeks in March would work if -- if plaintiff's counsel trial winds up going away. So let's just revisit this. Obviously as things go closer, sometimes these cases settle or dismiss or go to summary judgment, but the possibility of a trial beginning March 11th or March 17th could work if the trial winds up going away. At the moment, we will hold the week of May 12th.

MS. CENDALI: Thank you, Your Honor.

THE COURT: Very good.

Other logistical issues. I ask counsel, both sides, split the cost of providing a transcript of this hearing to the Court.

I am just going to remind you of the hearing format we've set out. Each side prepared three

minutes of material on each of seven topics. We're going to go topic by topic, back and forth.

On each of them, Thomson Reuters will go first and ROSS will be some follow-up. I'll ask questions as needed.

10:11:06

I also ask, when you're giving me -- you know, there are a number of issues you briefed. You've briefed them well, but they'll still help to go over some of them orally. It doesn't mean I haven't read papers. It will help the Court to the extent you can provide citations and D.I. numbers rather than Declaration X and Exhibit Y to Declaration X, just in terms of there is a large record here, and the more precisely I can find things, the easier it will be. And as we get to each of these, I will -- I will try to ask for some more specifics on where I can find things. And if I can't find them, it will help direct me to them.

10:11:20

10:11:34

Our court reporter needs a couple of minutes. The most important person in the room.

(Discussion off the record.)

THE COURT: Let's take a five-minute adjournment.

(Brief recess taken.)

THE DEPUTY CLERK: All rise.

THE COURT: So we're starting with

10:17:27

Topic 1, the first fair use factor, the purpose and character.

Ms. Cendali.

MS. CENDALI: Thank you, Your Honor.

10:17:50 Just as another housekeeping thought, I see that there's some folks in the courtroom. We're going to do -- I am going to do my best to navigate confidentiality issues and sometimes speak generally and not name any specific person's names.

10:18:07 It's kind of hard because we need to be useful to you; that can't be too general. But I'm also mindful of those other issues.

THE COURT: I understand. If I say I need follow-up and you want a sidebar, we can talk about

10:18:21 that. I don't like sidebars generally, but that's a legitimate reason for one.

Likewise, if I have a question for you guys at some point, which is when you have, you know, sealed stipulations of agreed material facts and things

10:18:33 like that, things I may need to use, want to rely on, we are going to have to come to some agreed-upon way that I can reference these things.

And I think it's important that opinions generally be accessible to the public, but if there's a

10:18:52 need for specific redactions or crazy things at a higher

level of generality, I want a balance between showing the public, you know, and showing Court of Appeals what it's going to need too.

MS. CENDALI: Right. If your opinion is to be useful and understandable, you obviously need to cite some things.

THE COURT: Right.

MS. CENDALI: And however the Court wants to deal with that, we would.

10:19:09 And then I guess in related housekeeping, I'm going to try -- to the extent that Your Honor asks about specific records, I may offer it, but for Your Honor's potential savings is a cheat sheet in light of your comment about the docket. The first means

10:19:27 declaration, which many of our exhibits are to, is for Docket 678. The second means declaration is Docket 718. And the Oliver declaration is Docket 679.

THE COURT: Okay. Means Number 1, 678; Means Number 2, 718; and Oliver declaration, 679.

10:19:54 That's helpful.

MS. CENDALI: Thank you, Your Honor. May I begin?

THE COURT: Yes.

MS. CENDALI: Turning to Your Honor's

10:19:57 first question, the first fair use factor, under Harper

and Row and its prodigy, Factor 1 requires consideration of three subfactors: commerciality, bad faith, and transformativeness.

The degree of transformativeness, if any, needs to be weighed against commerciality and bad faith. Here all three subfactors weigh against fair use.

On commerciality there is simply no dispute that this use was commercial. This Court has already found in Docket 547 that ROSS's uses were undoubtedly commercial, and one of its goals was to compete with Westlaw.

THE COURT: Then ROSS didn't dispute commerciality.

MS. CENDALI: Absolutely not. But this is important, Your Honor, though, under Warhol at 530 and 31, because the Court there re-emphasizes the importance of commerciality, stating that when commentary has no critical bearing on the substance or style of the original, the claim and true fairness in borrowing from another's work diminishes accordingly.

If it does not vanish and other factors, like the extent of commerciality, loom larger. And that's this case.

As to bad faith, ROSS' undisputed contact constitutes bad faith. The Supreme Court held in

Harper & Row the propriety of the conduct as part of Factor One is fair use presupposes good faith and fair dealing.

In Harper, the Supreme Court found the
10:21:27 defendant knowingly exploited manuscript and ignored the other side's rights for its own benefits.

This case is like Harper. This isn't a case where the defendant merely reached out for a license and was denied; rather, ROSS expressly was told
10:21:40 that accessing Westlaw for competitive purposes violated Westlaw's terms of service, yet it was undeterred.

And, in fact, this case has a very unusual record filled with deceit in which ROSS in general here -- not naming names -- tried to get access
10:21:57 to Westlaw by having its executives pretend to be law students, by convincing its law firm to share credentials, by having an employee get access pretending to be a solo practitioner; and, of course, by hiring LegalEase to do indirectly what ROSS could not do
10:22:15 directly.

The law, we submit, should not condone or encourage such behavior as the Second Circuit stated in Rogers v. Koons, copying in bad faith primarily for profit-making motives is not fair use. This Court
10:22:32 should find, respectfully, the bad faith subfactor based

against fair use.

And to the final subfactor, transformativeness, ROSS cannot meet its burden of showing its use was transformative, let alone transformative enough to offset the significant commerciality and bad faith here.

10:22:47

ROSS used the Westlaw content for the same purpose as plaintiffs, which under Warhol weighs against fair use. As Warhol said at 531 and 532, the more similar the parties' purposes, the less transformative the use, because they're more likely to be substituted.

10:23:05

Here the purposes are identical. First, ROSS' overall purpose in copying the Westlaw content for the bulk memos was to create an admitted substitute, a replacement for Westlaw. It's hard to find a more clear-cut case of substitution than the facts of this case.

10:23:19

ROSS was not just doing an artwork that might have had some remote impact on someone else. It was creating a product specifically designed to be a commercial substitute for Westlaw, and it was marketed that way to take market share from Westlaw, to bring about the death of Westlaw contract, marketing ads that said "ROSS or Westlaw"?

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ROSS' purpose was to market a platform to answer legal researchers' questions, which is plaintiff's purpose too, one to one.

The Second Circuit held in ReDigi in an opinion by Judge Leval that found no fair use; that when a secondary use competes in the rights holders' market is an effective substitute for the original, it impedes the purpose of copyright to incentivize new creative works by enabling their creators to profit from them.

10:24:25 Check, same way. The Court found that that it used the competed directly with the original, was not transformative.

Second, both ROSS and Thomson Reuters had the purpose of using the Westlaw content as summations 10:24:40 and syntheses of factual legal issues selected and arranged in comparing in categories, which you'll hear more about.

Third, both ROSS and Thomson Reuters used the Westlaw content for the purpose of training the 10:24:52 parties' respective AI search algorithm. Years before ROSS was even founded, let alone commenced its steam, plaintiff used its own Westlaw content for the specific purpose of training its AI algorithms and to help to learn how to find relevant law.

10:25:12 And ROSS also used the Westlaw content to

train its AI. It cannot be overemphasized, Your Honor, that ROSS already had the pieces from another vendor. What it lacked was the legal analysis of those cases, the pairs of what's important and what goes with what, that that's what it needed. And it admittedly repeatedly in its depositions to find the relevant law in answer to questions, the same way with the same kind of analysis that ROSS's -- that Westlaw's attorney editors did it.

10:25:30 10:25:47

It got that analysis from copying the editorial judgment of Westlaw's attorney editors, as reflected in part by copying the more than 20,000 question-and-answer headnote pairs ROSS used for training. ROSS's whole platform was built on the facts of Westlaw's attorney editors. It's set up to compete with and substitute for Westlaw. It admitted it did, in fact, take people from Westlaw. This is not a transformative use as a matter of law.

10:26:07

THE COURT: All right. Thank you, Ms. Cendali. A few questions for you.

10:26:30

When I'm considering transformativeness, what do I focus on? Do I focus on the intermediate step, what ROSS did directly with the material, which was using it to train AI; or do I focus on the end, the overall output of the project, the legal research tool?

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And whichever answer you give me, why, and on what authority?

MS. CENDALI: Well, you can look at it in any way, most of the cases look at the overall purpose. Most of the cases, like Warhol, look at what was the ultimate purpose, what it's going to be used for, it going to be used to illustrate a magazine, that was the purpose.

There could be other purposes as well: I want to create artwork, I want to do other things. And those could be looked at; but, here, whether you look at the highest level of purpose or a more narrow purpose like just for training AI, either way, it's substituted, and, therefore, not transformative.

(Pause in proceedings.)

THE COURT: All right.

MS. CENDALI: Just may I interrupt to answer -- page 16 of our moving brief has a long paragraph citing cases such as Paramount, Peter Letterese, MGM, et cetera. It all stated that the overall purpose does matter in the analysis. Our point, though, is whether you look at it as the overall purpose, whether you look at it as the slightly more narrow purpose of -- to get answers to legal questions, or whether you look at it as training data, either way,

all those purposes align.

THE COURT: Okay. Now, your framework for arguing this is relying on the Second Circuit's decision in Authors Guild vs. Google. Three factors: commerciality, bad faith, transformativeness.

10:29:34

But I want to understand how I should read that after the Supreme Court's -- that's 2015 -- how should I read that after the Supreme Court's 2021 decision in Google vs. Oracle. They didn't decide good faith, yes or no, but there was some skepticism about whether it plays a role. So how should I feel about relying on the bad faith consideration and how much, if any, weight should I give it post-Google?

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MS. CENDALI: Well, two answers. One, as Your Honor noted, the Court, in Google, just said, I'm skeptical about this, but the Court did not take the opportunity to overrule or change Harper, which remains the law of the land and the law that the district courts and the courts of appeals throughout the country have followed.

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Moreover, when you look closely, as I'm sure Your Honor has, that opinion, the Court cited, in particular, Campbell on that. And the concerning Campbell there was about, Gee, I don't want to discourage people from reaching out and asking for a

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license because maybe that could moot a big expensive case for a small license. So I am not going to hold that against people if they reach our for a license and were denied.

10:30:56 And that's why in my remarks I was trying to distinguish that type of use where bad faith may not matter as much from the type of bad faith here. In Google, Google was not hiding what it was doing --

THE COURT: Right.

10:31:09 MS. CENDALI: -- unlike ROSS. So let's point out that we only found out it was ROSS -- think about it, Your Honor. There was all this advertising, We're better than them, and ROSS versus Westlaw, come to us, we're better -- not disclosing at all to the world, 10:31:22 to consumers, that it was actually built on all of our judgments. And we only found it was them long afterwards. Not so in Google and these other cases.

And that's why I say that I understand that the Court made that comment, but I think you have 10:31:37 to look at it in context of --

THE COURT: All right. So context, Campbell is the 2 Live Crew "Pretty Woman" parody.

MS. CENDALI: Yes.

THE COURT: In a parody case, like, we 10:31:48 are not really talking about good faith, bad faith,

like, the person being parodied, the whole idea -- well, that's different -- Google is a commercial case, but it's a commercial case where they're not hiding anything and they're producing something different. And this is a case where it is a commercial case but it's a commercial case where undertelling, they're hiding it, they got turned down for permission, et cetera.

10:32:04

So that goes beyond the factual context that Google itself was confronting, and no reason to think that having to reserve the issue would necessarily foreclose considering it here. That is your argument, right?

10:32:17

MS. CENDALI: That's exactly right. And to be clear, though, Your Honor, I think the law of the land is to assess each one of those points, but to be clear, even if Your Honor said, I am going to give no weight to that factor, we would still win because it is incredibly commercial, as Warhol gave new life to, and, you know, the days of transformatives being, you know -- the Litmus test is gone. And that was really clear.

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THE COURT: How objective is good faith? How amenable to summary judgment either as an objective inquiry or as -- based on facts that are undisputed or conceived here?

MS. CENDALI: Good question; but, here,

10:33:06

the facts of what occurred are not in dispute. There's the actual e-mails, all of which were cited to, where someone said, you know, specifically, I'm going to get access on the false representation that I was a -- a law student, you know, things like that. So when the facts aren't disputed, there is no historical facts for a jury to decide. It's really the legal interpretation of the facts, which Your Honor can do.

But, again, if you wanted to write an opinion that said, This is what I think, I think bad faith, in my view, should apply here. It still exists. But even if I chose not to because of the commerciality and the lack of transformativeness, it would be the same result.

THE COURT: What are your best record citations for bad faith -- undisputed, undisputable evidence that you say should be read as bad faith?

Now, Mr. Parker may read it differently, but you're making arguments about what I should infer from them.

MS. CENDALI: Exactly. And that evidence would be -- forgive me.

It would be the first Means Declaration 678, at Exhibit 51. This is about their law firm telling them that they couldn't get access.

THE COURT: Their law firm, ROSS's or LegalEase's?

MS. CENDALI: ROSS's law firm, whose name I will not mention, told them that they couldn't get
10:34:43 access. You will see also in our brief the very telling thing from one of ROSS's executives saying, "Hey, come on, they're not going to know about it." That's an example of bad faith.

The other things: Trying to sign up law
10:35:01 students is first Means declaration, Exhibit 56, trying to get access from the -- more about the law firm is Means declaration, Exhibit 54, Exhibit 16, and receiving a copy of the terms of service meaning brief at 9 to 10. The thing I just mentioned that said, "My man, no
10:35:29 worries on it. Just keeping it under the hat for now. Westlaw and Nexus need not know about it," that's in our moving brief at 10, 24, and 25.

The posing as a solo practitioner is first Means declaration, Exhibit 74 at 855, about
10:35:49 sharing a Westlaw Edge agreement and saying, "Here is a quote I got from them under the false representation that I was a solely practitioner in Buffalo."

I could go on, but the -- there they are, a lot of them, in our moving brief at 12.

10:36:11 THE COURT: Okay, very good. Thank you.

And I think I will hear from Mr. Parker.

MR. PARKER: I am going to start with a quote that was in Sony v. Connectix. It's quoting Campbell vs. Acuff.

10:36:39 THE COURT: Uh-huh.

MR. PARKER: It says, "The question is whether the new work supercedes the object of the original creation or instead offers something new with a further purpose or different character. Altering the

10:36:52 first with new expression, meaning, or message, it masks, in other words, whether and to what extent the new work is transformative."

To put all of this into context, because there are big words used. There are words used like

10:37:08 "ROSS wanted all of the legal analysis." There are words used that "it was built on the back of their choice of what should be headnoted or not."

There were 25,000 memos. Of those 25,000 memos we've only been talking about the -- what I'll

10:37:28 call the "great" quotes. There are those 25,000. There are 4 to 6 quotes in all of those memos. That's -- if you want to take 5 as the average, that's 150,000 judicial quotes that are not tied to any headnote.

ROSS needed a full range -- and you will

10:37:49 find this in the Jimoh Ovbiagele declaration.

THE COURT: What do you mean "not tied to any headnote"?

MR. PARKER: There is no allegation that there was any headnote used to with locate any topical quote, any good quote, any irrelevant quote. This case has only been discussing headnotes as a small fraction, one-fifth, of all the quotes used to train. The purpose could not have been, and it's statistically impossible, to have taken all of their work or nearly -- even a fraction of the work. And we keep -- that is missing out of this.

This was not an attempt to map headnotes to quotes. It couldn't have been. Only one-fifth, at most, of any quote would have been mapped to a headnote. I am using their term of "mapped."

THE COURT: So let's say that's right. What does that have to do with the first factor?

MR. PARKER: Because what we were doing is, which is without dispute, featurizing these quotes, the end questions matching the words. Without dispute, we removed anything that would be mapping because it's all a bunch of numbers. And we provided -- and I am going to have to give you the record cites after because I don't have them in D.I.

We have provided to this Court an example

of exactly what that looks like. We have in the declaration of Mr. Marks that you can't reverse engineer -- he tried -- Dr. Branting tried, Dr. Marks accepts that as true -- and you can't get back to anything close to the original expression.

10:39:32

We completely transformed it, in other words, from an expression of any kind to how words, one relate to the other, across 27 different things, without dispute. Their expert, Dr. Krein, says, oh, you can find it there, but he made no attempt to find it there.

10:39:51

He makes no attempt to show that in the final search engine there is a key number, a headnote, or any expression at all.

They suggested maybe there, but Dr. Krein, this is at paragraphs 129 and 130 of his opening report, had two days of access to our source code. He could have located it and provided specifically what he was talking about.

10:40:07

Let's go to the next step. When this original was adjusted, the memos were adjusted, it went into a training data aspect. Once ROSS arrived at those numbers, those features, the training data -- just as with Westlaw -- was moved to a side. It did not touch the source code. The source code is a bunch of numbers. We provided examples of what those numbers look like.

10:40:28

10:40:47

The purpose was to remove any human intermediated content to make legal research cheaper. Is that transformative? Oh, my goodness.

It's more transformative than what happened in Sega. In Sega, they created new games looking at someone's source code. In Sega, Sega still had to tolerate new games being played on the game system where they were competing by selling games as well. And the Court found it was still fair use and bad faith.

In Sega, they were negotiating a license and they didn't like the terms, so they just went ahead and did it anyway. And I don't see that bad faith; it is different in degree but not in common.

And in Google, I cannot read Google to say that Google was acting openly. Google 2 was negotiating a contract with Oracle, and certainly Oracle did not think they were acting in good faith, which is: You were negotiating with us, you didn't like the terms, and you decided to use it anyway.

THE COURT: There is no -- I don't recall Google discussing anything about concealment.

MR. PARKER: I don't either, but they made the bad faith argument, so I don't think it was just open and notorious conduct that somehow then

elicited bad faith argument. There was a bad faith argument made.

In Sony, which we were more transformative, Sony had to tolerate connectors using their games on a PC.

10:42:35

We don't make Westlaw tolerate our use of their system. We don't make Westlaw tolerate our use of their materials. We don't have those things.

Ooh, I just lost my train of thought. Give me a second. But at that rate -- oh, I know where I'm going.

10:42:56

So that begins to answer the same purpose. And you asked about the intermediate and the end. Let me tell you why we make that argument.

What their argument is, essentially, we make use of this copyrighted material; we have a right to control that copyrighted material. That is the beginning of a fair use argument because in Sony, they had the right to use that the copyright material, Sega, Google had the right to use --

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10:43:35

THE COURT: You want to make this case looks like Sony, Sega, and Google, because there is the intermediate use of the API or interface required to make this work with a DNE system or something else, but they're arguing, well, the ultimate problem still

10:43:50

competing in our space, which goes back some in terms of market, and I think irresponsibly well, maybe these games are competing with the Sony and Sega games.

MR. PARKER: I am saying two different things here. So just say with the Factor Four because that's where -- that's where that really comes in.

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The question isn't whether or not we are competing against Westlaw at all. The question is -- and I would like to give the quote for you, but I'd like to wait and save my thunder.

10:44:20

The question is whether or not the copyrighted materials are at risk under the Factor Four analysis. Not with the Westlaw platform written large is somehow under assault.

10:44:33

So let me go back. In all the cases when you talk about -- when they talk about, We could have used this and we could have done that, of course they could have. That's why there is a copyright infringement claim. That's why we have to, for fair use, acknowledge there is some kind of infringement.

10:44:45

All right. And that's why I'm saying Sega and Sony and Google, all of those cases are companies that said, We actually use our source code to make games, right? And so now there are cases -- and so that's why looking at it at that step, where you're

10:45:00

actually using the copyrighted material, is not -- is just the beginning for fair use. Because -- and the reason you look at the end result.

THE COURT: So you agree we need to look at the end result, though you think we need to start with the immediate use.

MR. PARKER: Yes. Because all of their cases -- and this includes their cases on page 16 of the reply brief -- are cases that actually go to analysis, Like you took the copyrighted materials and you made a thing. This is what happened in Warhol.

And then the Court concludes, Well, that's just derivative of the copyrighted material. And that's where the word "derivative" comes in. That's where the courts are saying, You have the right to control your derivative materials. It is the conclusion of a failed fair use argument.

In Warhol it was the same photo. It was a copyright violation; it could not be fair use. And so that's why I say to the Court, Let's ask how do you use the copyrighted material? What ended up -- what was the final result? And is that final result transformative?

And that's why Sony and Sega and Google actually do apply. And let me just say Google is transformative in that Google still contained the actual

copyrighted material. We don't have that either.

So, now, all of those cases, if you look at page 16 of their brief.

THE COURT: Reply brief.

10:46:37 MR. PARKER: Of their reply brief, yeah.

So Paramount is -- tells a story of "Star Trek." It's a book about the "Star Trek." Okay? Peter Letterese is materials developed from a book. So the end result is -- but that's not -- that's just

10:46:59 copyright. It's not the same purpose.

MGM is a play about "Gone With the Wind." They're going to say that's not transformative.

Warhol is about a Warhol photo that just had different colors. It has no different meaning, and

10:47:16 so that's not transformative.

And Wall versus Data, we could go through all the Third cases where they cite it is just a question that they are not transformative; they're derivative. Wall Data is software programming.

10:47:31 And Worldwide is about the book "Mystery of Ages." It's just reprinted.

They have another case about scientific papers, where the guy just changes the author and adds a couple of words.

10:47:48 That's why I'm saying for transformative,

you don't ask yourself, well, could the holder of the copyright have done the same thing? That is never the question because it presupposes you have the right to do the same thing. But fair use allows someone else to
10:48:04 come along and use it to transform, and that's what I mean by "end result."

THE COURT: Okay. Couple of follow-up questions.

How did ROSS input the memos into the AI?
10:48:20 What can you tell me about that?

MR. PARKER: It was converted -- so I will tell you at page -- let me quickly look at the page -- but it didn't -- the question is not a true question, so let me -- it didn't input it into the AI,
10:48:35 so... It took from memos and loaded them into a -- called CSV -- CSV, possibly.

THE COURT: Right.

MR. PARKER: It took about 80 percent at a random level.

10:48:48 THE COURT: It sampled 80 percent of a hundred?

MR. PARKER: Correct. 20 percent it set aside because they were used for validation training. I will give you the page cites.

10:48:59 THE COURT: Okay.

MR. PARKER: It then began to run -- it liminized it, which is removing certain -- so instead of stopping, it would become stopped. It removed like gerunds, past tense, and so on.

10:49:12 It then began to featurize across 47 features. How many words separate this noun from this verb? How long is an answer? How long is a word? How many long words are in the answer? And so on. All of these 37 features all described in Dr. Mark's deposition

10:49:38 evaluation.

THE COURT: Remind of where to find that declaration.

MR. PARKER: I will, but I can't do it right now. But if you don't mind --

10:49:45 THE COURT: Sure. Go ahead.

MR. PARKER: It then resulted in a series of numbers. Those numbers are taken and then used to train the source code. So there is no touch -- the source code used for the legal search engine, there is

10:50:06 no touch between that source code and the actual memos themselves, the words in the memos.

The training data, the memos, are pushed to the side, because all they want is the series of numbers stripped of expression, stripped of which

10:50:25 question came with which answer, because, of course,

part of the reason you want all of the different type of answers is so that the AI can actually know how the words relate to each other, so it can help figure out what aspects mathematically make something less good or more good.

10:50:43

And so the results are not the results that you get from ROSS. There is no dispute. Is the question that someone types in, which is not a question in one of the memos; they wouldn't even know what the memos were -- the question typed in in ten judicial quotes. That's it.

10:51:02

THE COURT: So maybe that is the answer to this next question, but say someone types in a search using "ROSS." What precisely does it spit back? Just ten judicial quotations ranked in order of responsiveness --

10:51:22

MR. PARKER: Yes.

THE COURT: -- based on these 29 parameters?

MR. PARKER: 27 parameters exactly.

10:51:29

THE COURT: So -- and those parameters, are they semantic, syntactic, kind of a mix, or both?

MR. PARKER: Let me find something for you. Let me just...

10:51:58

So these things are mentioned in

Mr. Ovbiagele's declaration, Mr. Marks' declaration. One of them is a feature called QER. It measured the number of words shared between the question and the answer.

10:52:14 Another is called Word2 -- the number 2 -- VEC, all one word. It generated a set of numbers that represented the words of the question and answers as real numbers in a vector space. I cannot tell you what a vector space is. That is either closer or

10:52:32 further away from each other, based on the possibility that the word would occur in proximity with another word in the natural language.

Other features generate a number that reflected something about just the question or answer

10:52:45 and not both; for example, the lexical generated a number that represented the number of words in the answer, the average word length of each word in the answer, the number of sentences in the answer, and the average sentence length in the answer.

10:53:00 And do you see how even that one has no relation to the question and it has no relation to a mapping, and it's doing this for all of the quotes, even that are terrible, which don't come from Westlaw, and they make no claim that any of the other four or five

10:53:19 quotes were taken and are subject to infringement,

because this case is not about wholesale taking legal analysis from Westlaw, and they don't have the evidence to show it. They try to make that argument, but as we note in our fair use opposition brief, what they do, they cite to things that are just widely out of bounds in terms of that.

10:53:39

So the evidence is -- for purposes of fair use, I know where we are. You're assuming in Franklin for fair use. I don't think we have to assume the scope of the infringement. They claim, I think, but what the actual facts of that infringement are, at most, a discrete number of headnotes, a very discrete number of key numbers 5,000 or so at most, 500 judicial opinions that our guys, undisputed, say, We don't want this.

10:53:57

10:54:19

And that's evidence of -- when you talk about bad faith, that alone, undisputed, when they received an actual thing with all of the headnotes and synopses saying, We don't want this stuff. This is not useful to us.

10:54:33

THE COURT: What e-mail are you referring to right now?

MR. PARKER: Hold on. I'll tell you that just in a moment.

10:55:04

I might be able to find it faster for

you.

MS. CENDALI: Page?

MR. PARKER: Page 21 of ROSS's fair use brief. It is Exhibit 63 to the declaration of Ovbiagele. And the quote is ROSS said it was bad data and they wanted to -- they wanted that stuff taken out, that it was irrelevant from the data center.

THE COURT: This is e-mail from whom to whom on what date?

MR. PARKER: It is -- that, now, I'm going to need to do a little bit more work.

Do you have it?

MS. BERRY: It's from Thomas Van Der Heijden to Terry Whitehead, who is an employee from LegalEase.

THE COURT: How do you spell the last name of the sender?

MS. BERRY: It's V-A-N, space, E-R, lowercase, capital H-E-I-J-D-E-N.

MR. PARKER: And what date is it?

MS. BERRY: I don't have the date yet.

MR. PARKER: Okay. Terry Whitehead was the principal at LegalEase to whom -- with whom ROSS was interacting.

And then one final point on bad faith.

Exhibit 71 to the Means declaration. And, again, I will get you the D.I. cite. It is an e-mail to LegalEase, asking LegalEase to use Westlaw, lacks a source -- other reputable source to create the legal memos.

10:56:42 The undisputed evidence is that ROSS did not direct LegalEase to use Westlaw. The undisputed evidence is that LegalEase was deposed by both sides. The principal at LegalEase, the CEO, was -- said -- testified, without dispute, nothing contradicting it,

10:57:02 ROSS did not direct them to use Westlaw.

Terry Whitehead, again, the principal at LegalEase, said, "I wasn't directed to use Westlaw, and, in fact, we used LEXIS and Google."

So I think, again, that also finally

10:57:17 bears on what is or is not bad faith.

THE COURT: Thank you.

Unless there's any brief -- if you have a brief, pointed response to anything specific you disagree with in there, I'll listen to it briefly before

10:57:33 we move on to Factor Two [sic].

MS. CENDALI: Let me -- let me try briefly.

MR. PARKER: I -- I --

THE COURT: Sorry. Mr. Parker.

10:57:39 MR. PARKER: We have the burden on fair

use, so, you know, I -- it is a little bit more than following the rules of order, but...

THE COURT: That's a fair point. I just want any factual rebuttal, like what Mr. Parker just said is incorrect. And if you say that he misquoted something or is taking something out of context, I will let him respond.

MS. CENDALI: Thank you, Your Honor. Just briefly, they're trying to use the trees and the technology that mask the purpose, which is what we're all in the case and care about, purpose. Not the how in copying it. At one point, photocopying was the new clever thing, but the law is clear that however you call it -- and Arroyo is a really good example of that. We cited that case.

You can do your own Rube Goldberg type thing, but if it walks like a duck, it talks like a duck, it is a duck. And, here, they train their content -- and I'm saying -- the quote is on page 29 of our brief -- because they needed legal questions mapped directly to case passages that answer those questions. Moving Brief 31: "We needed question-and-answer pairs."

And their own AI expert, Dr. Branting, at first Means declaration 23, said that ROSS's algorithm learned from the relationship between the pairs. And

that's how it answered the questions. That's this whole point, because the whole way it worked was because our editors did the analysis of saying, this is how you answer a question, when you ask a question, you got that answer.

10:59:14

There is really nothing more to it.

And I'm more than happy to explain why this has nothing to do with -- first off, intermediate copying is not a "get out of jail free" card. Sega actually stands for that proposition. It can be actionable.

10:59:31

This is not a case about code. This is not a case about reverse engineering. It's not a case about needing to do anything. Those cases are just not applicable here, but I will stop.

10:59:42

THE COURT: All right. I will let Mr. Parker respond limited to the points that were just raised by Ms. Cendali, and then -- he'll have the last word and we'll move on to Topic 2.

MR. PARKER: I am just going to respond to the factual matter.

10:59:53

There is not a shred of evidence that the only thing that ROSS returned was the quotes that corresponded to a headnote. There is not a shred of evidence that would be what, at most, 25,000 cases that

11:00:07

would be returned. There is not a shred of evidence that it was so limited, that that's what they were looking to do.

And, moreover, there is not a shred of
11:00:24 evidence that discarding 20 percent, randomly picking which ones you're going to put in would ever obtain the result that you were trying to copy the results that Westlaw returned.

THE COURT: I am satisfied and thankful
11:00:40 for both of those presentations.

Now we'll go to Ms. Cendali on Topic 2, the fourth fair use factor: The effect of the use on the potential market for or value of copyrighted work. I realize there is some connections to the previous one.

11:00:57 Please proceed.

MS. CENDALI: Thank you, Your Honor.

In Harper & Row vs. The Nation, the Supreme Court stated that Factor Four is undoubtedly the single most important element of fair use, and with good
11:01:10 reason, because Factor Four has the greatest potential to impact the incentives that the Constitution was intended to promote.

ROSS bears the burden of proving that the secondary use does not compete with the relevant market.
11:01:27 Warhol at 49. Ross cannot meet its burden. Instead,

this is an odd case where plaintiffs submitted overwhelming evidence that ROSS caused three primary types of market harm or effect.

The first type of market harm is that ROSS substituted for the original Westlaw work by actively marketing Westlaw subscribers to switch to ROSS. This wasn't just an incidental, it was -- the whole purpose was to get them to switch. And, again, market -- first Means Declaration 78 adds -- ROSS or Westlaw adds touting the debt of Westlaw. First Means Declaration 70.

ROSS developed a marketing plan to offer discounts to customers who unsubscribed to Westlaw. Means Declaration Exhibit 57.

ROSS's witnesses and experts testified that ROSS not only intended to replace Westlaw, but admitted that the ROSS platform actually did do this. For example, one of ROSS's cofounders admitted that law firms substituted ROSS or Westlaw. He was asked, "Did you hope that law firms would stop using Westlaw and use ROSS instead?" He answered, "Yes, and eventually they did." First Means Declaration Exhibit 2, moving brief at 9 and 15.

ROSS's 30(b)(6) witnesses also said the intent was to create a replacement, and were users

indicating that they would replace Westlaw with ROSS? Yes. Moving brief at 8 and 4 -- 14.

The second type of market harm presented here is that ROSS diminished the value that plaintiffs 11:03:21 obtained by their own exclusive use of the Westlaw content as training data for their legal research algorithms. This isn't a post-comp kind of legal argument. This is based on the facts. Plaintiffs trained, using their own content, their own AI search 11:03:41 algorithms long before these folks came on the scene in 2010. Moving brief at 28 to 29.

We specifically trained it on the question-and-answer pairs. They did the same thing, and they deprived us as -- of our exclusivity. And a loss 11:03:58 of exclusivity -- is noted about the exclusivity about the book -- about the part in Nixon and Nation -- is a form of harm recognized in Harper.

Moreover, worse, talk about the facts, is ROSS not only knew that exclusivity was important, but 11:04:14 it admitted it. And it admitted it because one of its cofounders testified that he told -- ROSS told LegalEase to destroy the bulk memos because ROSS did not want somebody else to get the training data that was based on our stuff so that they could, quote, create a machine 11:04:35 learning model that's comparable to if ROSS's.

Goose and gander is the legal principle here. This is first Means Declaration Exhibit 13, moving brief 16.

Ross can't now claim there is no value in the training data when they themselves recognize the value of it.

11:04:48

The third market harm is that ROSS impeded plaintiffs' ability to license the Westlaw content and its derivatives in the current market or in the potential market for Westlaw content and its training data. This kind of market harm is recognizable in the Third Circuit in Murphy vs. Millennium.

11:05:02

Ross created a substitute legal research platform, as they have admitted. This is the same kind of harm in Davis vs. The Gap, in which the Second Circuit held that by taking it for free they avoided paying the customary price and caused a loss of royalty and revenue and diminution of the opportunity to license.

11:05:17

Same concept in Fox News Network, which -- Mr. Simmons and I -- cases where the Court said, Look, clearly, someone was willing to pay for this and there's clearly a market effect here.

11:05:34

And, here, ROSS was willing to pay a lot of money -- I won't say how much -- to get the training

11:05:52

data. It shows the value. None of that money went to us had we wanted to do it.

I learned long ago, you don't make money on losing money on every sale and making it up on volume.

11:06:07

ROSS's copying, thus, more than, alone, constitutes market harm. And ROSS can't meet its burden. But the correct legal standard is not just to look at ROSS, but to look at and examine whether the use became widespread.

11:06:26

Campbell and Harper explained that it's not fair when isolated instances of minor infringements were multiplied many times become an aggregate, a major inroad on copyright. Harper 569, Campbell 590.

Through decades of investment and creativity, West and Westlaw have became the gold standard in legal research. This has provided a huge benefit for everyone using the legal system; lawyers, clients, judges. You know longer need to look for a teeny needle in a giant haystack to find relevant case law. Yet, if the abuse became so widespread that everyone were free to copy the Westlaw content to create their own competing platforms, it would radically undermine plaintiffs' constitutional incentive to keep creating.

11:06:44

11:07:04

11:07:20

Why would plaintiffs continue to hire and train attorney editors for generations if their work could be copied by others and support other people's businesses to come in and maybe charge less because they don't the R&D expense? It makes no sense. And that's why Harper was so create in finding Factor Four so important.

11:07:36

If ever there was a case where Factor Four -- and Factor One, Two, and Three -- made a difference is this: ROSS simply cannot meet its burden.

11:07:51

THE COURT: So just one question to you, and I am going to ask the same question to Mr. Parker.

So I see two possible markets here. One is the market for legal research tools, the other is the market for AI training materials.

11:08:06

As I said in, you know, my opinion granting summary judgment on the antitrust counterclaims, I don't view the markets here as well defined. Does that -- that mattered for the end opinion. Does it matter here in the fair use analysis?

11:08:24

MS. CENDALI: I don't think that this -- antitrust is so focused on market definition. That is a different world than fair use. And Courts frequently -- and I, again, commend to the Court the decision in the RTVI Fox News case, because it's typical in fair use

11:08:41

cases that you have multiple markets that are assessed.

You have the primary market, you have the derivative markets, you have potential markets, all of which are assessed because any one of them could be relevant.

11:08:58

And that's the case here. You have such an unusual situation, Your Honor, where there is an overt use, choose us and not them. I don't think you need to do more, and then lots of subsidiary things about choose us and not them.

11:09:11

And then you also have the admitted concept that there is a market for training data. We use it ourselves. It's, you know, the experts admit there is a market for this. And remember -- and forgive me; of course you remember -- but the statute just says "potential market," and so that's another way it's different from antitrust. There hasn't have to be an existing market. It just has to be a reasonably anticipated, reasonable market that one could develop.

11:09:28

11:09:45

In every way you slice it, this was harmful to us and caused market harm. And I don't want to be corny, but I really do believe in this principle of killing the golden goose. Like, it's great to have derivative rights in society, and that's important, and that's part of the purpose of fair use law. We get

11:10:07

that. But when the use is so overtly, expressly, and intended to be competitive in this particular way on so many levels, there is the danger of killing the golden goose. And that's why Factor Four exists.

11:10:29 THE COURT: Thank you.

Mr. Parker.

MR. PARKER: So when the Court goes back to read plaintiff's Factor Four analysis, I would like the Court to focus on the fact that what they do is they

11:10:50 talk about the Westlaw platform.

This is a copyright issue, and I am going to read a quote from Google versus Oracle, because the question is not harm to the platform in all its aspects; the question is what is the harm to their copyrights.

11:11:08 And that's the fourth statutory factor: "Focuses upon the effect of a copy in the market for or value of the copyrighted work." That's at page 35.

It then continues: "But a potential loss of revenue is not the whole story. We must hear, must

11:11:33 consider not just the amount, but also the source of the loss. A parody may kill demand for the original, but this kind of harm, even if directly translated into forgoing dollars, is not cognizable under the copyright factor.

11:11:52 THE COURT: Right. Hustler versus

Falwell, Campbell, we get that. What does that have to do with this case?

MR. PARKER: Because they have never told you in all this litany what is the harm to their copyrights. They tell you what happens to their search engine, but not what happens to their copyrights. If people want headnotes, synopses, all their copyright materials, there's still only one source for it.

If they come to us, we don't have them. To say that we harmed them because they have an exclusive right to training data is nothing more than what I said before, which is all copyright holders have an exclusive right to use their copyrights as they wish; and, unless your use is transformative, you're stuck with a copyright violation.

But in every case, someone says, I could have used that copyright that you used. I could have used it too. But fair use recognizes that Google is like, We could have come out with a phone using the same APIs.

The Court said, Yeah, but that is the fair use analysis. It's not whether or not they could have put the same copyrights that are at issue that are being fought over for fair use to the same use or not.

And understand, again, to go back to what

I said -- what I said previously, their cases are cases where the conclusion is this is a transformative. You're just using the same copyright. It works.

That's what Murphy is about that was cited by Ms. Cendali. It's the same -- it's just copying over; and, of course, you're not going to satisfy Factor Four if you're copying over the same thing without transformation.

Their potential market for AI training data, there is not a shred of evidence that that has been impacted. I'm setting aside that they never planned to enter the market, and that's -- but there is not a shred of evidence that it's been impacted. We weren't in the market. There is literally nothing. There is literally nothing. Conceivably, at most, they have conceivably it could be impacted, but they don't have anything that says it is impacted. They don't have any dollar figures around how this would have somehow usurped a market when we weren't even in the market.

THE COURT: Who bears that burden? You guys approach Westlaw, they didn't want to sell it. You took it anyway. I mean, why isn't that enough?

MR. PARKER: We are saying to the Court there is nothing here. And I don't know how you can bear burden when you say there is just literally nothing

here. The other side says, well, no, there is potential, and they don't say anything more than that.

I think we have met our burden. There is zero evidence. And so I don't know how you could prove the negative where they say, No, but there is a potential harm someplace.

11:15:01

THE COURT: Your argument seems to be there is not an effect on the market, but they're not denying that there is a market for AI training materials for legal reasons.

11:15:15

MR. PARKER: I am forced to make that acknowledgment because our expert actually said something different than that --

THE COURT: Okay.

11:15:20

MR. PARKER: -- but this Court excluded that opinion.

So I have to -- I have to assume right now that there is a market for AI training data for legal data. There is apparently no one in the market. There is no evidence that there is anyone in the market. There is no evidence that the market has been impacted if there were a market. So I'm actually saying to the Court, when we say, There is nothing here, we have satisfied our burden.

11:15:34

11:15:49

It would be different if they said, There

is a huge market, and there was some evidence there was market, and I said to you, Listen, there's evidence. I've got nothing here on this.

THE COURT: As I asked Ms. Cendali, does it matter that neither the market for AI training materials or the market for research training tools is well thought? That is something I talked about into my antitrust.

MR. PARKER: I think it is -- there is a problem at some point, because we are sitting here telling you there is no evidence of there being a market. I don't know what it would be. And you're asking me, What is your burden here?

And I'm saying, However the way in which these markets are mentioned by plaintiffs, my response is there is no evidence.

And so, yes, their definition of what these could possibly be would have made a difference, perhaps, when you say, Have you carried your burden? With what they said is their harm, as their injury, it would be helpful to know.

And, also, let me begin. I am going to go to Sega/Sony, because this is -- in Sega, the game manufacturer literally had to tolerate people playing games on their Game Station, even though they were in

the same business of video games.

You see, it's not just as you compete in some general sense. They all look at what the copyright issues are. Does the copyright survive.

11:17:16 And I'm saying here does the copyright survive as AI training data? It does. They can continue to sell it. We could not go out in the market, and that's why I say we couldn't have impacted the market. We are one person in the market that used,

11:17:31 except they couldn't derive income from us for that, but that's true of all fair use cases.

Google refused to license. Sega refused to license. And then when they say we used it for ourselves, of course. So did Google, so did Sony, and

11:17:50 they started Oracle D.C. to say, We use this for the same reason, I agree that's what they -- Sega used their source code for the same purpose, which was to create games. That's why that falls short.

THE COURT: All right. Here is a

11:18:06 follow-up question.

MR. PARKER: Yes, sir.

THE COURT: Your argument is, Look, I distinguished all those cases on page 16 of the reply brief because those were all non-transformative laws.

11:18:20 It sounds to me like you are taking what was a

Four-Factor balancing test and turning it into a test in which Factor One is a threshold issue. And that explains kicking all the others out, and then neatly you can say this is different.

11:18:34 MR. PARKER: I am actually saying something slightly different than that.

Factor Four does wrap around into Factor One, and courts will say the more transformative it is, the less you have a Factor Four analysis.

11:18:46 And so I don't mean to conflate them purposely. I'm saying to you they are related to each other. You start at Factor One, and by the time you get to Factor Four and this happened is --

THE COURT: Has our Court linked them in

11:19:00 that way?

MR. PARKER: I am not saying they link. I think courts have said -- and I am going to have to get you a cite for that.

THE COURT: Is this Supreme Court or the

11:19:08 Third Circuit taking that approach?

MR. PARKER: I am not sure what approach you're talking about.

THE COURT: Of making Factor Four, in part, dependent on the transformative, this factor.

11:19:19 MR. PARKER: Hold on. I am going to ask

her a question.

(Discussion off the record.)

MR. PARKER: I do not.

So, no, I do not -- I believe Sega and

11:20:18 Sony both do that.

THE COURT: That's my understanding.

Okay. Ninth Circuit opinions. They don't bind them.

Why should they persuade me?

MR. PARKER: I believe the logic is this:

11:20:30 The more transformative, the less likely it will compete

in the market against the copyrighted materials that

were used. That's the logic because, again, it's not

about whether you compete in the marketplace, so it's --

THE COURT: For the court reporter.

11:20:51 MR. PARKER: I'm sorry.

The theory, I believe, is the more

transformative, the less likely that any competition in

the market will harm when Factor Four protects, which is

the copyrighted works, the original copyrighted works.

11:21:07 I think that is the theory.

THE COURT: All right. Very good.

Let me hear from Ms. Cendali. I think

there is some points you made that I would like to give

views on, and I will give you the last word.

11:21:22 MS. CENDALI: Thank you, Your Honor.

Three quick topics. First, it's appropriate to look at the harm for the Westlaw platform because the Westlaw platform contains the Westlaw content, and that is the -- where we license that content.

11:21:37

Second, there are two ways to obtain a legal research platform based on those decisions and judgments of the attorney editors. You can license Westlaw or, unbeknownst to us until recently, you can go to ROSS, and that's the problem.

11:21:56

Second point I want to make is with regard to markets and licensing and the like. I am quoting Dr. Seuss versus ComicMix at 489: "Fair use is an affirmative defense, thus requiring the defendant to bring forward favorable inference about relevant markets."

11:22:17

All the evidence that exists here goes our way, but even if we had done nothing, ROSS still could not win unless it came forward.

THE COURT: That's Dr. Seuss on the burden of proof, but cite me -- you said, All the evidence goes our way. What are your best handful pieces of evidence on the market?

11:22:33

MS. CENDALI: Well, I mean, two things. First let me deal with it legally and then I'll go back

11:22:47

to it.

THE COURT: Sure.

MS. CENDALI: On pages 18 and 19 of our moving brief, we explain the law in detail with regard to potential markets, particularly for AI training, which counsel admitted exists as a new market.

11:23:00

And there's no legal requirement, as they seek -- my friend on the other side seek to emphasize, Well, you're not currently selling it. There is no requirement to currently selling it. It's on Judy Caldwell.

11:23:17

THE COURT: It's a potential market will suffice.

MS. CENDALI: That's right. And the harm is that it's impaired by anyone like them that accesses it without paying the customary price with regard to data.

11:23:24

And then with regard to market harm, again, among the evidence to cite for this -- and we go through it in the brief -- is that moving brief at 19, part of the Malinowski report, ROSS paid LegalEase X amount of money to obtain this training data.

11:23:41

And under Fox News versus TBIs, the fact that ROSS was willing to pay for it shows a plausibly exploitable market, 883 F3d at 180.

11:24:03

Other research companies also use their AI on their own platform. This is in Malinowski, which indicates: "Demand first means declaration" -- at Exhibit 28 -- "of the fact that ROSS required LegalEase to destroy its copies of the bulk memos to prevent them from selling them and licensing them to others" shows and evidences the value of that Means declaration, first Exhibit 13, the 30(b)(6) deposition transcript at 167:2 to 168:20, enumerated 16, that numerous other companies currently license large portfolios of content for AI training purposes, versus Means declaration; Exhibit 25, Krein opposition report at 79 to 88.

11:24:19 11:24:46

It's like you asked me my best evidence, and I'm like, Which child do I like the best? There's so much evidence here, and the problem is we did our best to present it to provide a complete picture, but it isn't our burden.

11:25:04

THE COURT: All right. Now, let me go to this issue I asked Mr. Parker about, which is, why should I be persuaded that transformativeness matters here?

11:25:18

If I turn it around, I say, Okay, look at the parody cases. Look at Campbell versus Acuff-Rose. Like, you could wind up tarnishing the market for the song "Pretty Woman," by, you know -- belittling and

11:25:33

making fun of it -- it's syrupy, it's sappy, etcetera -- but that doesn't seem to be enough to prevent a parody from being fair use. Does that meaning more general principle is right, that transformativeness should not -- either isn't relevant or should not loom large under Factor Four?

11:25:51

MS. CENDALI: Well, there's a lot of discussion about this, if you want to listen to the oral argument in the Warhol case, and the Court chided the friends arguing that case because they kept asking them, Warhol is supposed to just be that Factor One, and what they actually presented was transformativeness, but they kept -- you know, counsel for Warhol kept bringing up Factor Four, and the Supreme Court to was getting, I think, very impatient, saying, This isn't about Factor Four, this is about Factor One. And the opinion in Warhol is all about Factor One. There's nothing --

11:26:07

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THE COURT: I get that, but I think Mr. Parker's point is Factor Four is downstream of Factor One. Factor Four's influence, which is not logically inconsistent with if we're arguing Factor One, stick with Factor One.

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MS. CENDALI: Well, just -- there's -- the factors are not in order. It says: "The Court shall examine these factors, including other factors."

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It's a nonexclusive list; often public policy is one of them.

But as we know from Google v. Oracle, you could start with Factor Two, you could start with -- you know, ours restarted with Factor Four because it seems so outcome determinative. So it's not really downstream. They're independent considerations, all of which, as I understand it, the Court should look at each of the factors and then another factor, and then weigh them and decide as a matter of law whether it's fair use.

THE COURT: If I were Mr. Parker, I would stand up and say, hey, you know, there are going to be transformative uses that affect the market and you can't use that to offer some genuinely new things.

MS. CENDALI: Two important points, Your Honor. And I realize I wasn't giving you the most clear answer to your question. Because as I was alluding to earlier, there had been a thing in the law Terau -- the case -- maybe that Seltzer case in the Ninth Circuit, where some people argued that transformativeness became a litmus test; that if it was transformative, then that would be a domino effect and all the factors would be like.

As we cited in our brief, Nimmer says

under Warhol that was Kahn. And the Warhol case was very clear that each factor needs to be considered and weighed. And the other key thing that Warhol said is that transformativeness is one of degree. Like in some
11:28:28 of our cases, including the Fox News case and our victory in the Harry Potter Lexicon case finding no fair use, the Court said, well, maybe it was a little bit transformative, but it doesn't matter because the market harm so outweighed that.

11:28:46 Now, there is a difference in kind here. This is not a parody case. They're not arguing that. And the premise why parody is different is that no one has the right to stop speech about critical things you may not want. In fact, Thomson Reuters would be hard
11:29:02 put as a news organization to say that you shouldn't stop criticism. But this isn't about criticism --

THE COURT: The First Amendment considerations that call for leaving plenty of breathing room for parody in a way that don't call for a more
11:29:19 classic IP evaluation.

MS. CENDALI: That's right. This is pure substitution, and none of either sides' experts raised, oh, there's some First Amendment issue here or anything like that. This is licensing, not licensing, marketing,
11:29:31 head to head for competitive business, unbeknownst to us

based on our content.

THE COURT: I don't know if it's a defective lecture, but you seem to have some issues with the notebook up there. Do we need another lectures or something to keep it in place?

MS. CENDALI: I have often had some lectern issues, as my team would know.

But I apologize. This lectern slides back. A lot of lecterns are flat. It's my fault for putting too much on it. I hereby move things to the second flat shelf and promise to do better.

THE COURT: I will ask my courtroom deputy that maybe at the break we can look to see if there's a flat lectern or flatter one or a surface area or a second one we could move next to it to give her some more options.

MS. CENDALI: Thank you, Your Honor.

THE COURT: Mr. Parker, the last word.

MR. PARKER: Thank you, Your Honor.

So I guess I want to start here. We have to be careful when we talk about things like the Fox News case and all these cases because in Fox News, again, that's not -- they were just taking clips and it's not transformative. And you sort of get to that end result, you can look back and say, well, of course

everything else sort of follows from that because you're in the same market, it's the same material and so on.

THE COURT: We have a spectrum of transformativeness. And you're arguing this is pretty far along; I think the counter argument would be this isn't genuine AI, this is AI being used as a search tool that's looking at things like word distances and word lengths and a whole bunch of stuff that is not at all intuitive. But you're right, this is not a cut and place or a simple spitting back.

MR. PARKER: Right. But I also want to say the market that was just discussed is entirely not what fair use cares about. Fair use does not say you look at the copyrighted materials used and determine whether the copyrighted materials used had a particular market. It doesn't. Because there is no fair use case that could actually work.

Like in Google, Oracle had use for the API. They even tried to license it. It did not have value. In sake of the source code used, it did have value. They tried to license it. They almost got it licensed. So that we use the copyrighted materials, that -- paid for or not, that we used it and that there was another -- that West and plaintiffs could have used it for the same purpose and made money on it, fair use

doesn't ask that question because fair use assumes that copyrighted materials have value because they are exclusive.

What Factor Four says is now having used those copyrighted materials, does what resulted compete in the market to injure the original copyrighted works? And again, there's not a shred of evidence that there was any impact on the market, that they could not go out, if they decided to change their mind, and sell as much as they want because ROSS was never in that business at all. In fact, the affirmative evidence that was just cited to you, that ROSS wanted everything destroyed. So there was no possibility that ROSS was going to enter that market.

THE COURT: Just a moment.

(Brief pause.)

THE COURT: All right. Let's move on to topic 3, question 3, the type of copyright compilation derivative created that Thomson Reuters' holds needs disputed part of Westlaw of headnotes number system and any implications for the strength of copyright protection.

Now, this is mainly Mr. Simmons, but I am going to flag for Ms. Cendali, I am going to circle back to linking this up to factor 2 and fair use or whether

you would want to chime in on this. But let's go with Mr. Simmons first.

MR. SIMMONS: I will always welcome Ms. Cendali's commentary on fair use.

11:34:03 Your Honor, let me give you the punch line on your question. Westlaw is an original creative work that is protected as a compilation of copyrighted constituent material and it's headnotes, the West Key Number System, and other choices are all entitled to

11:34:19 ordinary copyrighted protection.

Now, Your Honor's textonomy in the question, the creative derivative compilation matches footnote 3 from the Eleventh Circuit's decision, Intervest Construction versus Canterbury. And two

11:34:33 things struck me in rereading that opinion.

First, the court's statement that, "When crucial question in the dispute involving compilations is substantial similarity at the level of protectable expression, it is often more reliably and accurately

11:34:49 resolved in a summary judgment proceeding."

Second, it's not clear to me that the Eleventh Circuit's factor categories are mutually exclusive because you could have a compilation that's based on something else, that's also creative --

11:35:02 THE COURT: And when I read your

briefing, I want to pin down your position. It seems to me that you are arguing both that the key number system as a whole is a compilation and the compendium as a whole, the headnotes is a compilation. But you also
11:35:17 want to claim that the headnotes themselves are, I believe, derivative works. It's hard to argue that these are original creative works, but they're derivative even though you don't claim a headnote that -- a copyright of the original judicial opinion.

11:35:31 MR. SIMMONS: So to answer the first question, yes, we do claim they're multiple copyrights. And in fact, the Eleventh Circuit is the only circuit that I'm aware of that actually does this categorization separating out to this or this or this. Most courts are
11:35:43 looking for what's the original expression. So it's either in the text or it's in a compilation through selection and arrangement, and it could be both, as Your Honor recognized in your first opinion.

I will circle back to the derivative work
11:35:56 question because there is a very clear answer on that, but I want to start with the compilation because I think the Eleventh Circuit's opinion was a little unclear in that when it was talking about compilations, it meant factual compilations, and the law is extremely clear
11:36:10 that factual compilations are a completely separate

thing than other kinds of compilations.

THE COURT: This is not Feist. I get this is not Feist.

MR. SIMMONS: Okay. So, you know, your opinion before made that clear. And so from our perspective, this isn't Feist, we're not in a thin compilation world. We are in a rich copyright within a copyright world, and you can find copyright protection at multiple levels. So that distinguishes us from all the cases that ROSS is citing with regard to compilations.

THE COURT: Now, that's as to the headnotes.

How about as to the key numbers?

MR. SIMMONS: So the key numbers also protected by levels. The terms that are used in the West Key Number System are not fact. It's not like there's some thing that you can discover in nature that says, ah, this is the marine cases or this is whatever. And Dr. Lighter, which was ROSS's expert, who came in trying to say this is somehow required, actually testified in his deposition -- and I have the citation later in my outline -- that you could have done this any different way, that a legal research platform doesn't need to have a key number system, you could organize it

different way. And in fact, Westlaw has done it different ways. Every year they go back and they go through the key number system and they say, oh, actually we think it should be this way or that way, maybe this will be more understandable to people.

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So it's not a thin copyright in the key number system either, and you know that because it's not -- again, it's not a factual compilation. So you can use the Eleventh Circuit reasoning. You have to go through and say, it's not a factual compilation, is it a derivative? If not, we are back to original copyright principles. Which, by the way, it's the only way the Third Circuit has ever looked at anything. They don't -- this whole concept, I can't find much in the Third Circuit's law.

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THE COURT: So your position is neither the Supreme Court nor the Third Circuit tells me to do this boxing and I shouldn't or don't need to go through that.

MR. SIMMONS: Exactly.

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THE COURT: We will hear from Mr. Parker about that.

MR. SIMMONS: Sure. Let me address the derivative-work question, because there's actually a case that gives us a very clear answer on how to deal

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with that, which is a case that ROSS cited for a different proposition, but we are repeating for the argument, it's Ets-Hokin versus Skyy Spirits, which is a Ninth Circuit case, and that court explained that for
11:38:33 work to be categorized as a derivative work, it -- quote, "The work from which it derives must itself be within the ambit of copyright." That's 225 F.3d 1068 at 1079.

So -- and that was based on the court's
11:38:50 reading of the text of the copyright act, which keeps talking about copyrightable works in the derivative context and looking at the legislative history.

So the Ninth Circuit says that's -- you just don't go there. And in this case, where -- what
11:39:02 they are saying that headnotes are based on judicial opinions that, under Georgia versus Public Resource, aren't copyrightable. We just can't be in the derivative work world; we're in creative world. And so that sort of answers the question on derivative works.

11:39:17 THE COURT: So derivative is useful when you are thinking about, all right, you need a license from the original author, and you need a license from the person who derived it. It's a useful concept of those topics. In this context, no. I mean, we -- but
11:39:34 that doesn't get rid of the whole arguments.

They're saying this is -- this is, you know, thickness and thinness is a spectrum. Feist is at one extreme end of the spectrum. I agree with you, this case is further along than Feist, but this is not a
11:39:50 novel either. This is not someone just came up with characters in a plot out of whole cloth, right.

So how does the thinness or thickness along this spectrum matter or play into it, and where along the spectrum should I put both the headnotes and
11:40:06 the key numbering system?

MR. SIMMONS: I don't think that -- once you get out of the thin protection that talks about --

THE COURT: Okay.

MR. SIMMONS: -- I don't think it really
11:40:14 matters for the purposes of this case. Because once you're out of factual compilation and your out of derivative work in that categorization, you're in creative. So now we go to just, is it original? And you just do the analysis that your Court -- the Court
11:40:27 already talked about in its opinion. As Your Honor knows, Feist standards are extremely low, ^teeth I have.

Ms. Cendali, at the pretrial conference, and Your Honor had a conversation about Feist, and the quote was, "Even a directory that contains absolutely no
11:40:45 protectable written expression meets the constitutional

minimum for ^ protection if it features an original selection and arrangement." That's Feist at 348.

Likewise, the Third Circuit in Kay Berry versus Taylor Gifts noted that, quote, "All creative works draw on the common well spring that is the public domain," and so when an author combines those elements and adds his or her imaginative spark and the imaginative spark occurs, the author is entitled to protection and the result.

11:41:22 And so when Your Honor wrote your prior opinion, you cited to L. Batlin & Sons for the proposition that all the author needs to contribute is something more than merely trivial variation, something reasonably his own.

11:41:35 So when you look at this case, you think about all the things that Westlaw did, you can read Thomson Reuters's cases editorial manager, Lori Oliver's declaration, that's D.I. 679, that Ms. Cendali gave you at the start of the argument.

11:41:51 And she gave us all kinds of judgment and creativity that go into not just the West headnotes, the key number system, including the head of text itself, the choice to make something even a headnote, where in the opinion to make something a headnote, that sort of

11:42:03 linking concept, and those are all clearly original

choices that are entitled to protection.

And it's not just me saying that. The Eight Circuit in West Publishing versus New Data Central said that explicitly. It discussed the judgment and creativity of West editorial process at 799 F.2d 1219 at 1226, where it goes through and says this is protectable.

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Indeed, headnotes are the classic example in all on the Government cases of what is the protectable thing in all the materials that people work on.

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And I will note that although that prior opinion is before Feist, it's remarkably consistent with the law after Feist.

The Second Circuit in CCC Information Services versus Maclean held that even evaluations of vehicles are protectable, and the reason was the professional judgment and expertise involved. That's 44 F.3d 61 at 67.

11:42:44

And so there is no question that Westlaw and the copyright material in this case are entitled to protection for all on the original material that was added. There's is just no reason that we need to get into a debate about how thin or thick we are. It's, was it trickily different? If so, protectable, we move on

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to the next step in the analysis.

THE COURT: So you say it doesn't matter for the copyright infringement question. Does it matter for ^firm Factor 2, the nature of the copyrighted work?

11:43:29 And if you want to consult with Ms. Cendali, that's fine, or she may answer.

MR. SIMMONS: Yeah, she -- I will cede the podium to Ms. Cendali on that, but I'll say to you the punch line there is also no. It's still protected

11:43:42 because the nature of the work is also on the spectrum, and so where you have something that's original like this, you're not in that limited ^fair use. But let me cede the podium to Ms. Cendali.

MS. CENDALI: The answer is, it doesn't

11:43:59 matter because the Westlaw Content is kindly created as Mr. Simmons indicated, and their own expert, as we detail and agree, not only says that we do it differently, but competitors such as LEXIS. They didn't have headnotes at first. Then they decided to have

11:44:21 headnotes. And then they had -- they made headnoted -- a different of headnotes per cases, and they will write them differently. That is their own expert saying that.

So there is ample creativity there, and not only that, there is another element in Factor 2 that

11:44:36 hasn't gotten as much light, which is that we also

invested substantial labor and time to create the Westlaw content with the expectation of financial return.

And in the Hustler Magazine case, Ninth Circuit, 796 F.2d 1148 to 1153, ^and well data, in assessing this factor, courts considered both whether it was ^created imaginative and original, and whether the copyright holder invested substantial labor and time.

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THE COURT: All right. So your answer is, legally, you agree with what Mr. Simmons said, that yes, there is a spectrum. But fact- -- your answer is fundamentally a factual one in that we are on the right hand, could have strongly protected end of that spectrum.

11:45:09

MS. CENDALI: Yeah. I think the facts are undisputed as to what these things are, what the headnotes are and what West ^ waybills. No one says that it was a black of marble that you found on the beach. This required judgment and thought, much more so than in the car-kind-of-case assessments that were indicated.

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And law is hard, and anyone could recode or reprocess one of your own opinions, probably, in different ways. You yourself might do it differently than the West editors do, and they change it over time.

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So the point is that in looking at factor 2, it is -- it is creative, and therefore, it should be entitled to protection.

Let me put it this way, simplify: There is no way Factor 2 should favor them. That's the bottom line.

11:46:12

THE COURT: All right. Your answer is clear.

Mr. Parker.

11:46:20

MR. PARKER: I don't want to pander to the Court, but I'm going to pick up sculptures.

Sculptures you find marble, they're hard to do. It is a skill; it's not done in one day. And I make the most beautiful octopus sculpture in the world, but I spent 10 years doing it.

11:46:50

That sculpture is construed in this subject to the thinner copyright protection than the book that my 5-year-old writes in 15 minutes.

All that work that you do, it may be creative, but all that work you do, the amount of energy, does not translate into the thin or thickness of copyright protection. And they don't have a case that said it because the only case that really gets at it is Feist, and its sweat of the brow is not a factor.

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And if you read their briefs, and they

tell you how many people work for so long to make the most careful selection of headnotes, it still doesn't answer what copyright protection should apply. They give you no case that says a compilation, however well done, should somehow get anything more than thin protection. There is not a single case they cite.

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THE COURT: But, Mr. Simmons, those make the argument that, you know, this is -- I should be in the Eleventh Circuit's boxes here.

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MR. PARKER: But there are only three boxes. It's creative, compilation or derivative.

THE COURT: He's arguing that that's -- if I were the Eleventh Circuit, I would have to follow that, but saying I'm here --

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MR. PARKER: There's -- every case we cite -- we are not just talking about Eleventh Circuit cases. We cited a bunch of cases from a bunch of different places that said compilations received thin protection --

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THE COURT: Why is this --

MR. PARKER: -- nothing.

THE COURT: Why is this in -- but this isn't Feist. There's more originality than Feist.

MR. PARKER: That depends on what we're talking about. Because we keep going between headnotes

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as words and headnotes as something else.

The key numbers are a way of stacking and racking and organizing. Of course there are multiple ways to do that because that's true of Feist too.

11:49:03 That's true of any compilation case; that's what makes one compilation creative and original.

If there was only way to do it, it wouldn't be creative nor would it be original. We would just move on; there would be no protection.

11:49:16 So when we're talking about headnotes as they relate to key numbers, and key numbers as they then stack and rack cases, that is a compilation. And it does not matter, it does not change whether it's thin or thick. There are other ways to do it.

11:49:33 Because again, if there were no other way to do it, there would be no copyright.

THE COURT: Sure. But their argument is that the protection is not exclusively compilation. In Feist, it is a bunch of names and the phone numbers that

11:49:47 themselves aren't protected. Each individual headnote is protectable as well.

MR. PARKER: Now, then -- that's -- then we are not talking about headnotes as part of a compilation. And that's where, I think, we're -- we're

11:49:59 saying you can't just muddy it up and just say, this is

this. We're saying, compilation thin. If you want to go and look at the individual works within a compilation, then let's talk about those individual works. But you can't just mash it up and say, the
11:50:18 combination of the two is somehow different, and no case says that.

They could say they don't want to be in the Eleventh Circuit box, but they certainly don't tell this court that there is any other case that is accepted
11:50:33 or viewed, that if it's all the same, you just mix it all up and you go from there. And that's not what the law is.

Now, let's talk about headnotes separately now. Okay. There are two different issues,
11:50:44 but let me address Issue Number 1.

In page 22 of our opposition on fair use, it's other places. We cite two cases.

Alfred Bell & Company, which is the reproductions of public domain paintings were derivative
11:51:05 quotes.

We have Allen Greene, which they don't cite. It's a 1944 Eastern District of Pennsylvania case that was affirmed in the Third Circuit that say, Art objects depicting public domain religious shrines were
11:51:22 derivative works. So in other words, the underlying

thing, at least in the law of this circuit right now, does not need to be copyrighted. They are derivative, and therefore, they're subject to protection.

Secondly --

11:51:38 THE COURT: So, wait. What third --

MR. PARKER: Yes, it is --

THE COURT: What in the Third Circuit says I have to understand derivative copyright as applying irrespective of whether the underlying document

11:51:52 was in the ^Public domain or not.

MR. PARKER: Correct. And again, that is at page 22 of our opposition at the bottom after the page.

THE COURT: So you're not disputing that

11:52:02 a single work can both be individually detectable and part of a compilation?

MR. PARKER: Correct. When we discuss this part of a compilation, we are not talking about the words -- it's just how it helps organize.

11:52:13 THE COURT: Right. And then when you kept referring to earlier arguments in structure sequence organization, there's like, well, there's possible additional creativity involved in the structure sequence organization that is not exclusive of the

11:52:26 creativity of each underlying headnote.

MR. PARKER: Each underlying work, so -- yes.

THE COURT: Yes.

Do you view the key number is as merely protected compilation?

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MR. PARKER: They have to be because they can't be protected under copyright. They are just single words. They don't do more than that. The don't do anything.

11:52:51

The only -- as standing alone, a key number that says "labor and employment" is not a copyrightable thing. It's not subject to -- it's -- works -- it becomes copyrighted in a way that you organize cases underneath that; that is a compilation.

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THE COURT: I sometimes look in the front of a West book, and I see a list of key numbers that almost serves as a table of contents or on index. So we are not talking about two words in isolation; we are talking about a whole list of them that is a taxonomy for the law.

11:53:33

MR. PARKER: Which is a compilation, yes.

So -- again, loss my train of thought, but I'm going to get there again. Oh, here we go.

The next step, and what is not mentioned here, is however much effort the thought process goes

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in, there are constraints that they impose. Not us; they impose. And we cite to Lori Oliver, and we cite to their desire. The desire -- and their request is that headnotes follow the words of the judicial opinion.

11:54:20 The desire and need is for lawyers to be able to locate cases using headnotes. They have constrained it, and it's separate and apart of whether or not it's derivative. They constrained the expression in such a way that it can't be subject to extreme

11:54:40 copyright protection.

And again, however creative it is however much effort it takes, copyright doesn't look at the effort. It just says, what is the expression? And is this expression original? And does it have a minimum

11:54:59 level of creativity.

THE COURT: Anyone who has taught students knows the difference between the students who think they deserve an A for effort and the students being evaluated on the fruit of their work.

11:55:10 MR. PARKER: So independently of whether it's derivative, independently of whether it's a compilation, they have so constrained it that it can't be subject to broad copyright protections. And if it were -- so you're going to hear more about this probably

11:55:29 infringement, but when they literally quote the language

of a Court and put in the headnote and someone says, ah, that language is good, but it's literally the language of the judge, they can't claim the copyright over that. They just can't. Otherwise, their headnote just could be filled with quotes from the Court.

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And the fact that they decided to, they think, pick the best parts, that is a great idea, right? But we're not here -- you've never heard us litigate, and copyright law doesn't ask the question, is it true that it was really good or really bad; or you did a good job of what you were trying to do. Copyright looks at the expression itself, not whether it's the best selection, the worst selection. That's not even a debate we're having.

11:56:07

Now, you ask about factor 2. First of all, as the Court knows, this factor does not weigh that heavily at all on these things. Second of all, there are cases -- they actually don't -- their cases are apposite to this. Harper & Row is about an unpublished manuscript, and I can tell you now, courts crunch pearls if you produce an unpublished manuscript. That means that factor 2 analysis is much, much different. That is the Love vs. Kwitny.

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The rest of the cases, like Fox, again, we are at places where the courts are saying, hey,

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listen, this looks exactly like the original work or this is not different than the original work. Those are the cases.

So in sum, there are different modes of analysis, but first you could just look at constraints itself. In the MGA -- the Mattel vs. MGA case is one case. You could look at what I call the trivial pursuit case, which is a cite, Sintalva (sp.) is another constrained case. You can look at the newspaper case, and we cited one, where those are constrained. And then you can leave behind, if you wish, which bucket any of this stuff falls into. But I think we're right, a desire to tell this Court I don't want to be in any particular bucket is not useful if there is literally not a single case that allows someone to just say I don't want to be in a particular bucket.

THE COURT: Just one moment.

(Brief pause.)

THE COURT: Please proceed.

MR. SIMMONS: Okay. Third Circuit case compilation, not thin. Educational Testing Services vs. Katzman, that Your Honor cited in your prior opinion, that was a case where there was a compilation as to the whole set of questions and then each individual question was also protected.

THE COURT: Is this the ETS does SAT, I think --

MR. SIMMONS: Correct. It's the test questions case. And so Your Honor relied on that in saying that even when you have a compilation copyright, you could also have a copyright for the things that make it up. So that's the Third Circuit's law. The way they analyzed that case is the way they analyze all the cases in the Third Circuit. Is it trivially different from whatever came before or is it just something creative? It's the same test. So that doesn't do anything in terms of those cases.

In terms of -- I promised you the Lighter citation to their expert. That's 678-7. That's the deposition transcript where he discusses his opinions and essentially concedes that there's lots of different ways that these things can be done.

In terms of the issue of we constrained it, but the idea that we had made a determination this is how it's going to be. Yes, that's called creativity. That is our originality. We told our attorney editors the way we want to do this is this particular way. You can't come back later on and say, oh, once you made that choice to do it this way, now you lose protection.

THE COURT: Just a moment.

Mr. Deputy, could you turn down the volume. I think he's a little louder than Ms. Cendali.

(Brief pause.)

MR. SIMMONS: And I can give you a couple of cases. The one that I like because -- we argued, that is Oracle v. Google at the federal circuit on copyrightability, which was not reversed by the Supreme Court. That's 750 F.3d 1339, 1360. And what the federal circuit did there is collet a variety of cases, all which stand for the proposition that it's the copyright owner that gets to decide and you can't then say, oh, it's constrained later and you lose protection.

Another one, if you want to, is Apple versus Formula. That's 725 F.2d 521, 524. That's the Ninth Circuit saying the same thing. So that doesn't get them out of the box either.

In terms of the key number system, it's not just single words. As Your Honor noted, it's textonomy. And in any case, they are our words. If you started talking about things as, oh, if you just look at the words in isolation, then I do the same thing to sentences in a book, you can't say that because each word in a sentence is a word, suddenly you lose protection in the combination.

The point we're making is, when you put

all the things that we are adding together, you look at what we did, and that's what's protectable and that's what they copied. And you know that it was valuable because they took it. If they had wanted to just use the judicial opinion text, they had that. It is conceded fact. They didn't need judicial opinion text. What they wanted was someone who wrote it differently.

12:01:35

And that's because the way that the artificial intelligence operates is if you gave it just the judicial text and said here's the judicial text, it wouldn't know what to do when someone comes up with a new question. The value of the headnotes and the reason that they went to the headnotes is that they are different; that when a human person then comes along and says the same thing that's in the headnote, out pops the judicial opinion that our attorney editors identified. That is the reason that headnotes are valuable.

12:01:54

12:02:06

THE COURT: Now, Mr. Parker placed some great stress on there being only 25,000 headnotes here, whereas there were 25,000 memos and a whole bunch of other quotations in them that weren't being challenged. What do I do with that?

12:02:23

MR. SIMMONS: Thank you so much for asking. The 25,000 memos had one question copied directly from a headnote, I'm going to talk about that

12:02:36

later, but there is a best practices guide that LegalEase produced that said here is how you create a question: Go to the headnote of each -- go to the key number, but each headnote, convert that into a question, and that's the question. And there is a guide that I have citation for at the desk that is actually the step-to-step directions to do that.

The answers are selected in a -- are labeled with different types of things. Great quote is the top one, and then it goes down from there. The great quote is what the AI is trying to learn to produce, and the great quote was always the case that was connected to the headnote. So --

THE COURT: So the number one answer was the infringing answer.

MR. SIMMONS: Correct.

THE COURT: And the others were deliberately designed to be worst ones. So the training value was in picking the preferred one and you wouldn't want the lesser answers to be the ones that were taken.

MR. SIMMONS: Correct.

THE COURT: Got it.

MR. SIMMONS: So number one, our stuff. And then all the ones that are bad and listed as being worse and worse and worse are not.

So that's the whole -- and then the AI learns that that's what the attorney editors thought. And that's why, again, the value comes from us, that comes from our work, and that's what they're copying.

12:04:01 Let me end by talking a little bit about fair use. So Mr. Parker, we were up to this question of labor. So just to be clear, Wall Data is a post Feist case. The case that Ms. Cendali was quoting, 447 F.3d 769, is after Feist. And what the Ninth Circuit held is 12:04:22 that even after Feist, when you talk about nature of the work, you can look at more than just creativity, that you're not restricted. Because the point there is, what is it -- you know, what do we want from the copyright system? And maybe there is a work that, from the 12:04:36 copyrightability point of view, has less creativity to it, but if it was really labor intensive to create, as a system we still want to have that protection.

So Wall Data is one case on that subject. It cites to others that are pre-Feist, MCA versus 12:04:52 Wilson. And what's interesting about MCA v. Wilson is that case is favorably cited by the Supreme Court in Google v. Oracle. So continuing vitality of that concept --

THE COURT: Right. But there is no 12:05:09 dispute that sweat of the brow alone is not enough.

MR. SIMMONS: For copyright.

THE COURT: For copyright, right, yes.

MR SIMMONS: For nature of the work and fair use, it is relevant.

12:05:15 THE COURT: Got it.

MR. SIMMONS: And so that is really important in -- not so much in this case because I think it's all creative, but in cases where you're trying to cite, should I allow someone to start pilfering the

12:05:28 golden goose's eggs, to take Ms. Cendali's example, if it's really labor intensive, perhaps you should not do so. And that's what Wall Data is saying.

THE COURT: I have this image of geese going into labor that I don't --

12:05:41 (Laughter.)

MR. SIMMONS: At least it's gold eggs, though. That distinguishes it.

The last thing I'll say is on bad faith. The bad faith cases are not restricted to pilfering. In

12:05:52 LA News v KCAL, which is a Ninth Circuit case shortly after Campbell, the Court actually does find bad faith. And it is based on the idea that, yes, you can ask for a license and be rejected, but when you know you need one, when the facts are clear that that is something that is

12:06:06 required, that could be bad faith. So it is not just

this secret thing being stolen. But even if it was, let's be clear, Westlaw is behind a password-protected website. It's something that you actually have to do a direct contract with West to get access to. So it's not so far afield as other cases involving bad faith.

THE COURT: Thank you. The last word to Mr. Parker.

MR. SIMMONS: I think I get the last word. It's our burden. But I will let Mr. Parker.

MR. PARKER: The Best Practices Guide. So --

THE COURT: This is the guide --

MR. PARKER: Let me start at a different place, and then I will introduce it.

THE COURT: Okay.

MR. PARKER: There was an argument -- there was an argument that the search results returned the best quotes, and not a shred of evidence of that, nothing. Not in their expert reports at all.

The evidence is that when we trained, you actually break apart the questions and answers completely, so you would not have a relationship between a question and answer at all because, again --

THE COURT: Where would I look in the record for that?

MR. PARKER: Let's see. Let me find -- I am going to give page cites.

The first place that it would appear is pages 13 to 14.

12:08:12 THE COURT: Of?

MR. PARKER: Of our opposition to their fair use brief. Let me find our fair use brief.

It is at page 21, 22, 23, 24, 25, 26. There was a reference to how the Best Practices Guide

12:08:52 directed -- Best Practices Guide was a guide that was created by LegalEase to govern how they would prepare memos.

THE COURT: By the way, I don't know whether either side can tell me where the Best Practices

12:09:09 Guide is.

MR. PARKER: Yes, I can. And we are going to give you the D.I. number, but it's Parker Declaration Exhibit 28. And all of this is referenced at page 8 of our opposition to the fair use brief, so we

12:09:24 will give you the cites that will help you out with that.

The Best Practices Guide was a fit document created by LegalEase that governed how it would prepare memos.

12:09:35 The Best Practices Guide, quote, "The

headnotes are proprietary, and you should not copy, paste them in the question."

The contract attorneys were instructed not to copy headnotes into questions, and so quite contrary to what was just represented, the instructions were not to create -- make headnotes in the questions. Just, it's not supported by the record. The record says something quite different than that.

12:09:55

And so when we're talking -- the Court said there were 25,000 headnotes. There are not. There are 25,000 memos. They accuse us on 21,000 headnotes.

12:10:11

The only headnotes that they are accusing us relate to the great question, and what is -- when they provide the idea that there is a motive to essentially copy those things and make it into, it is relevant to know that one-fifth of the materials used were unrelated to any of the accused headnotes, that the great quotes -- the 21,000 headnotes represent less than 1 percent of all the 28 million headnotes.

12:10:32

I mean, it is a vanishingly small. There is no -- there is no explanation how the vanishingly small amount could somehow then become the entirety of Westlaw. And again, they have no evidence of any -- they don't have -- we have declarations, and output is nothing related to Westlaw. There is nothing here like

12:10:55

12:11:19

that. And they don't have anything to contradict that at all.

Now, a few other things. I think that it is a very difficult argument to support that the author gets to determine the level of protection for the copyrights. I think it's just tough, right, because that wouldn't make sense. A sculpture who scopes an octopus would spend more time than a 5-year-old writing a 10-page novel, and the 5-year-old would get greater protection without even thinking.

I -- it is not the author's prerogative. It is a legal conclusion of what type of protection is afforded regardless of what the author may think. Otherwise, there is no way to regulate the law because --

THE COURT: It would seem like the reasonable position to ^meld, too, is it's the evident amount of manifest effort in the works. Someone couldn't just run up a thousand hours on something that was trivial.

But it's the kind of thing that takes a long time to make that would seem to weigh in favor of a factor two finding.

MR. PARKER: But I think it's not so. It can't be so. Because if I created a compilation that

listed every human being in the world --

THE COURT: Right. Right --

MR. PARKER: -- it would still be a compilation.

12:12:54 THE COURT: It's still compilation because the question is the amount of effort required for the creative contribution in there and the simply the compile, compile, compile, compile is not a creative addition.

12:13:10 MR. PARKER: Then I could decide over that 20-year period that there are many different ways that I can put this together, many, many different ways. And I do it in a certain way. I do it by hair color; I do it by height. I actually cross-reference height, 12:13:27 hair color and so on; that still doesn't make it anything but a compilation.

THE COURT: That's a fair point.

MR. PARKER: And the danger is, and if you start doing this, there are things that are very 12:13:41 creative that don't take long at all. Right. People write novels in a week; other people write novels over a lifetime. Ralph Ellison wrote Invisible Man over one period of time. Right.

THE COURT: There is the flash of 12:13:59 insight. Samuel Taylor Coleridge wrote, you know, *From*

the Ancient Mariner having just come out of drug-induced haze. It just all flowed out.

MR. PARKER: Correct. And there it is, subject to the greatest copyright protections ever.

12:14:14 Also, what are the metrics for it? It's very difficult to have a metric for that creative effort. Is it a dollar amount? Which is what they are suggesting. Is it the number of hours? Which they don't tell you. They just tell you people work really

12:14:29 hard at it.

And I am not taking that away, but there is no way to measure in an author saying, I worked really hard on this, and therefore, thick protection. And another saying, I can't prove to you how hard I

12:14:44 worked, but -- yeah this is -- you list this again, right, subject to, and that's the problem.

THE COURT: Okay.

MR. PARKER: All right.

THE COURT: All right. I think both

12:14:53 sides -- I think this is a good time for a lunch recess. Let's adjourn and reconvene the one o'clock sharp.

(Lunch recess.)

THE COURT: Good afternoon. All right. I want to thank the parties for being well-organized.

13:01:10 We've made good progress through Questions 1, 2 and 3.

Let's move on to Question 4, whether each headnote must be evaluated individually. Whether findings about individual or groups of headnotes can be extrapolated.

Mr. Simmons.

13:01:31 MR. SIMMONS: Your Honor, because you had asked for some citations. The best practices guide that we discussed before the break is at 678-36, that is the D.I. citation. And I will command the Court to page 4 where it talks about using best practices guide to frame

13:01:52 questions; page 8 where they actually show a headnote being converted into a question; and page 13 where it discussions using the connected case as the quote.

Turning to Question 4, "This case is well-suited to extrapolate findings about the headnotes

13:02:11 because the parties do not dispute what the headnotes are, just whether they are legally protectable.

As Your Honor and Ms. Cendali discussed at the pretrial conference, all of the headnotes are protectable under Feist both because of Thomson ^Reuters

13:02:24 in selection and arrangement and the judgment of its attorney editors about what should constitute a headnote, and that could decide the issue completely. But if Your Honor wanted to look at protectability other ways, there is other ways to look at it.

13:02:38 Another way to decide protectability is

to use the groups of headnotes that are categorized in Dr. Kron supplemental report, Appendix B. That's 690 -- it D.I. 690-6, -7, -8, -9, -10 and -11.

THE COURT: This is attachments -6 -7 -8, -9, -10, and -11. So six attachments for a single spreadsheet.

13:02:58

MR. SIMMONS: What the spreadsheet does is it gives you all the headnotes in the case, all the questions that were created from them, and the judicial opinions that are associated.

13:03:10

And then in the right-hand column, it categorizes every single judicial opinion to headnote based on five different categories: One is where there is a changed order of judicial text; two is where there was substantive addiction to or substraction from the judicial text; three is where the judicial text was condensed; four is where it reflects Thomson ^Reuters as attorney editor, selection and arrangement; five is where multiple of those are at issue.

13:03:29

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So the categories, what actually happened between judicial opinion and headnote, there is no testimony disputing that that's the correct organization. And even if there was, the headnotes themselves would supersede and control contrary descriptions of them. That's ^P Eric Guido Architecture

13:04:02

versus Simone Development in the Second Circuit, 602 F.3rd 5764.

So the only question you have to look at if you want to extrapolate is, what kinds of evidence am I talking about, and do I think that reordering, making substantive changes, condensing, selection and arrangement, are sufficient -- or more than trivial variations from the judicial opinions. If Your Honor decides that act is more than trivial, then that whole category is protectable and comes out. So that is a second way that you can slice the protectability.

13:04:17
13:04:36

The third way to do it would be to use ROSS's own submissions, and there's three of them we can talk about.

13:04:49

Before I do, though, I know Your Honor is familiar with engineering dynamics versus structural software. The district court in that case at 785 F.7, 576 at 583, said what you had said to us at one of the pretrial conferences, that even if you copy a small amount of material, you're still liable, there's still a judgment in your favor, quote, "The extent of copying would just be relevant to a determination of damages."

13:05:14

But, just looking a ROSS's own submissions, we can slice this -- if we get three additional ways.

13:05:28

One is Your Honor asked ROSS, quote, to "submit a list of all headnotes it believes are verbatim quotations or vary trivially from verbatim quotations of judicial opinions. That was your order at 612.

13:05:42 Out of all the headnotes that are issued in this case, ROSS submitted a subset and left 5,367 headnotes out of the submission in response to your order. That submission is D.I. 617, and all of the headnotes that didn't put in are at 678-27.

13:06:03 By excluding those roughly 5,000 headnotes from a request you made saying tell me what the ones that are verbatim or just trivial, that should be taken as an omission that the other 5,000 are indisputably more than that because it is their burden

13:06:19 to say what the unprotectable elements of the headnotes are.

We also look at this from the perspective of ROSS's software expert, Ms. Frederiksen-Cross. I deposed Ms. Frederiksen-Cross on her analysis. I walked

13:06:32 her through how she was comparing judicial opinions to headnotes to questions, and we produced what is now 678-21, which is a document using her spreadsheet filtered to just the headnotes that are different from judicial opinions and similar to questions under her

13:06:54 analysis, and that gives you 2,830 headnotes. So you

could use that subset.

Finally, you could use the attorney declaration that ROSS submitted in opposition to this round of briefing in the Kanter declaration.

13:07:11 Now, as we noted in our reply brief, that declaration is wholly inappropriate. You cannot, as an attorney, put in expert testimony explaining why you think something is protectable or not. That's just not how it works. You have to have an expert do that,

13:07:21 disclosed, deposed.

I am going to accept, for the purposes of this, that Your Honor considers that declaration and doesn't strike it. In that analysis, what they did was they took the two sets of headnotes that I just

13:07:37 discussed, they deduped them because there is some duplication, and they came up with 5,695 headnotes.

Now, they then subtracted out things that they think are unprotectable from that, which is only slightly over a thousand.

13:07:53 So even using the attorney declaration at the end of summary judgment with all the benefits of everything in the case, their declaration still left 4,534 headnotes on the table. So whether you do this from all of them are protectable, whether you do it from

13:08:12 the perspective of using Dr. Krein's filtration and just

deciding it's a legal matter if those categories are protectable or not, or you use one of the many submissions that ROSS made, all of that can be used to extrapolate up to what the protectable headnotes are, and it is wholly appropriate for the Court to do so.

13:08:25

THE COURT: One question for you. So in your briefs, you say, "I can find direct infringement of the headnotes in the key number system based on a subset of the headnotes on the period of more than de minimus copying."

13:08:41

Now, I can understand what infringing some headnotes could be enough to show infringement of compilation as a whole under a compilation period. But I don't understand how is it that infringement of some headnotes could be enough to show infringement of other headnotes on an individual copyright theory?

13:08:53

I mean, maybe, at most, you can get a jury to infer such things, but that would be a fact question at trial; certainly not a summary judgment amenable question.

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Does this mean the way you pitched your briefing, that you are only seeking damages under the compilation theory?

MR. SIMMONS: No. No to both of those.

13:09:17

So what our point was is at summary

judgement, the question was: Can we report into a judgment under Rule 54, which requires us to meet the elements of our claim, ownership of available copyright and copying of the constituent elements that are the original?

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If we show more than de minimus copying, then judgment should be to us.

The engineering dynamics case that I discussed earlier says we can then deal with that in damages, which the jury is going to have to wade through. But from a summary judgement, let's not make the jury have to make that determination. That's all Your Honor has to do. That's why you the can slice it and dice it in multiple ways. If you find there is some protectable headnotes and those headnotes have been copied, we win on summary judgment.

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THE COURT: Except for damages, the jury is still going to have to go through all the headnotes you're trying to find.

MR. SIMMONS: Well, the jury will have to determine damages.

13:10:03

Now, the damages model we are using -- we have a couple different damages model, and if you want get into details, ^Ms. Means is much more capable on that.

13:10:12

The damages model is based on the use of Westlaw. So the way that we calculate damages doesn't have to be based on how the specific headnotes work, because the point is actual damages are if they did not
13:10:27 have this service, then we would have made other sales. That's one damages model. And the other is, if we were going to license someone to do this, they would have had to pay us for each of the cases that they used, and that's another way.

13:10:42 So the damages model doesn't have to be, oh, now we have to go back to the headnotes because where the numbers are coming from is LegalEase's use in producing the bulk memos, which we have spreadsheets on from a financial perspective.

13:11:01 THE COURT: Right. Except on the direct infringement theory, not -- at the moment, we're not talking about precarious infringement, you know, is it enough that you can say that certain headnotes are infringed because your second model, at least, depends
13:11:15 on the number of them that was infringed.

MR. SIMMONS: So if our -- so what I would say about that is, from a damages perspective, you can look at actual damages or disgorgement of profits. Disgorgement of profits doesn't -- sorry, actual damages
13:11:31 does not turn on how many headnotes are specifically

copied. We don't have to get into that detail.

But even if you thought we did, then we would just present that to the jury to see the burden and insufficiency of having to decide whether there was direct copying or not. They could focus on the damages question, what do you think the value of the copied material is?

13:11:45

THE COURT: All right. Well, we may have to come back around to that. I mean, as a statutory damages model, that would go -- it would depend on the number of copyrighted -- copyrighted individual works I find infringed, but --

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MR. SIMMONS: Which we have as well.

THE COURT: -- I suspect that Mr. Parker is going to have some concerns about this.

13:12:09

MR. SIMMONS: Well, I guess to allay those concerns, Your Honor, the only -- no one has moved on damages. So there is no summary judgment motion pending that says we are limited in some way, no Daubert motion on that.

13:12:25

So, from where we stand, the motion is, did they directly infringe? The answer is clearly yes. That's the question that's presented by the briefs. If you reach that question, there could subsequent discussion of, okay, now we're in damages land, what do

13:12:38

we need to do?

But none of that was briefed; no one discussed damages, models, or any of that in the briefing. So it would be inappropriate to deny us what's clearly direct infringement on the basis that, yes, down the line there might be more questions for us.

13:12:47

THE COURT: You are quite right, these are separate questions, and that is a question for possible trial, but the Court is also trying to think through what that trial would look like. That is not -- I am not going to reason backwards from that to what the summary judgment looks like, but it is something certainly on our radar. Thank you.

13:13:03

Mr. Parker.

MR. PARKER: If we are going to continue with this, a compilation. Again, these are a little bit like quantum physics, like, these pendulums are both a wave and a particle.

13:13:28

But if we're talking about compilations, then these numbers don't work because there is no question -- there is no case that -- I'm sorry, let me say it this way. There's -- every case you have to take a super majority of a compilation in order to be considered to have infringed, and that makes sense in the compilation world.

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13:14:00

THE COURT: Part of the work? Part of the super majority?

MR. PARKER: There is no particular heart -- first, as Patri says, compilations really don't have a heart of the work. And I don't know what the heart of the work is. Each -- as I understand it, each headnote has -- is carefully manicured to a particular case, creative. And so if I remove a -- remove a case and look at the headnote, it doesn't give me insight into all the other headnotes that they have.

If I take a portion of their key number system, the whole value of the key number system is how it works all together as a way of organizing. So if I took some of criminal law, some of civil procedure, some of aviation, I don't see how that is part of the case -- part of the matter either.

I just -- you know, part of the matter, you can go to Harper & Row where they took the words -- I think that is the Gerald Ford case. And they took the words of Gerald Ford, and that was sort of the book. That makes sense.

But a compilation where you are taking bits and pieces, I just don't -- I know they make the argument, but I don't think they tell you where the heart is. And in a compilation world, I think, as we

argue, as we note, the fact that you have to take so much of a compilation actually tells you that you don't really get a heart of a compilation until you get to a very large number, and we just don't have that.

13:15:42 THE COURT: By the way, I do want to hear at some point -- you can take it in your order, but somewhere, I want to hear what you think about Dr. Krein's effort to batch these things from the various layers of this spreadsheet. Go whatever way you

13:15:53 want.

MR. PARKER: Let's start a couple different ways. First of all, I'm going to start here. There is not a single case that allows you to extrapolate at all. The Third Circuit case requires a

13:16:07 side-by-side comparison. That's it.

And all of the cases that they cite -- and the cases are Association of American Medical, page 25 of their motion, is a side-by-side comparison; Texas Holding, LLC, cited on the their reply brief,

13:16:30 page 13, side-by-side comparison; plaintiff's reply at 14; Peter Pan Fabrics, you will hear about it again when I talk about the next question, side-by-side comparison. And that makes sense.

So I will talk about Krein first. We

13:16:52 have never had an opportunity to respond to how Krein

batches things at all. They didn't move on those Krein numbers at all. So this is the first time we're told, you can just decide how you want to batch it.

But those things that Krein responded to or our statements that those headnotes are virtually identical or identical to the words of judicial opinions. And we say, with triviality, you can't just change small things or remove small things. And there has been no analysis done at all about what he considers some addition or some subtractions, that that makes that headnote continue to be copyrightable.

THE COURT: Now, Mr. Simmons points out there are 5,000 that you did not claim were trivial.

MR. PARKER: I will give you an example: 86 of those 5,000, of the cases, don't have headnotes at all.

THE COURT: All right. 86 of them don't exist. You have a small batch that were pre-1927. Let's filter those out.

MR. PARKER: Because then -- I guess, here is what I'm going to do, I'm going to jump to the best example, it's in their brief, where they give a headnote, a judicial text of a memo question.

The headnote text is: "A cause of action accrues to a person when that person comes to a right to

bring action," and then it continues.

The judicial text is: "A cause of action is said to accrue to any person when that person first comes to a right to bring an action."

13:18:33 The memo question is: "Does a cause of action accrue to a person when that person first comes to a right to bring action?"

We did not submit that as virtually identical because the headnote continues on past what I

13:18:48 read to you, but the portion that is -- appears in the memo, the question raised is, what they have to prove, is, did someone copy from the text of the judicial opinion or the headnote? Because they are almost identical.

13:19:10 So that's why those type of things weren't submitted to the Court because that is an analysis, if you do it side-by-side, but it wasn't a virtual identical.

Do you see what I'm saying?

13:19:24 THE COURT: I do.

MR. PARKER: And so there was no admission on our part; we just weren't overly aggressive in submitting to this Court -- we submitted to the Court the things that we could say it is. So word for word is

13:19:36 where the headnote is -- conforms to the judicial text.

We did that.

There are times when the headnote, which we did not bring to -- sorry. There are times we did not bring to this Court's attention where the question 13:19:53 actually has nothing to do with either the headnote or the judicial opinion. The words aren't the same. And so we didn't submit that to the Court because that was not the order given to us.

That's why you can't just go through the 13:20:10 5,000 and then extrapolate, because they came in all different variables, and, as I said, it's -- we are providing you examples, but their obligation is to show copying, and in this instance, there is one example. I don't think that they can show copying, at least that 13:20:27 they need to tell the jury that this is copying, and that LegalEase or whomever did not formulate this from the actual words of the judicial opinion.

It is their burden to show material misappropriation, and they haven't done it. They're 13:20:46 just asking this Court to take 5,000 things and you do the work. That's a jury question.

And when we get to the next case, when we talk about 5, those summary judgement cases, what we will call substantial similarity, although you know that 13:21:07 we want -- we think it should be virtual identify, but

those cases are where the judge is actually doing the side-by-side comparison, and in a fabric case saying, these are identical, or at a Tetris case saying, I'm looking at these two games, and I can't see any
13:21:22 difference between the two games.

THE COURT: So let me ask the question for you and maybe your ^friends on the other side. I'd like to have -- you know, is there somewhere in the record where I can find the 2,830 headnotes in one
13:21:39 column and memo question in the other column, or where I can find the 5,367 that, you know, you didn't claim as ^claim as varying trivially, one column and the other, because I agree with you, the Court ought to review these things individually, and I have not found such a
13:22:03 chart, but before granting summary judgement, I would want to go through such a chart.

MR. PARKER: I don't mind giving the Court such a chart. For the 16,000 or so with the filtration, we did that work for the Court. Right.
13:22:16 Because -- and again, we were conservative.

And so it wasn't an admission on our part that there was actual copy. It wasn't an admission -- so what is an admission was actual copying because, again, we have instances where headnotes run very long.
13:22:31 The judicial opinion has a portion of that headnote, and

the question reflects the words of the judicial opinion and not everything.

Two, it has to still be protectable elements that are taken. So material misappropriation, that's on them. I am happy to put together a chart as to every single one of these, but that is what's required.

You can't just say because you got one, maybe, maybe. No side-by-side comparison at all; none. None.

THE COURT: It's a fair point. Responsibility of the Court is to do -- if I take it away from a jury, it requires the Court to do the side-by-side comparison.

MR. PARKER: And then, finally, you know, a lot of work, we talk about Barb Frederiksen-Cross. That work was done before we knew exactly what headnotes were involved in this case. It was an algorithmic and mechanical comparison.

But anyway, you can't rely on Krein's view of what he thinks is substantially similar at all. It's not his province.

You can't rely on Barb, which he may or may not think -- it's not their province. That is a factfinders province in the rare instances where it is

-- copyright infringement is granted on summary judgement. It is still a judge looking at it, making these determinations, not some expert that is outside the bounds. And we cite the cases that say that in our
13:24:03 opposition -- oh, and damages.

So I'm not familiar with that engineering case, 785 F.7. I just read it. I don't see how it gets you to you can find one and then what we are going to do for the damages is run through and say -- and
13:24:24 extrapolate out.

As these cases indicate, used compare side by side, the works that are claimed to be infringed, you don't find -- not horseshoes and hand grenades.

13:24:38 THE COURT: I get the theory that if they can show a large enough number that would cause a drop in subscriptions. Subscription revenue could be independent -- not a linear relationship with the headnotes. It's like a threshold. I also get the
13:24:55 disgorgement of profits theory.

My issue was, well, what if it's not one of those two? If I look at some other things and those other models seem to have some kind of correlation where there is a certain value for headnote -- maybe I have to
13:25:10 do a median or an aggregate or something, but you still

would need to know the number of headnotes infringed.

MR. PARKER: Right. The of it is the crate to actually establish or challenge non-infringement. Because we sit there at a jury trial, you say I found one --

13:25:23

THE COURT: Well, no. If they were going to do that, you would have a right to challenge infringement on the other headnotes. That, I get. Now, if they have a volume independent theory of the damages that is a disgorgement theory or is a here is how many subscribers you lose once there is a -- you hit some threshold of you've got to use -- you know, you no longer have to use Westlaw, so subscribers switch. You could, in theory, come up with damages models that don't have a linear relationship.

13:25:36

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MR. PARKER: Their damages aren't tailored that way. They depend on everything that they establish has been infringed.

So if you found five headnotes, their damages model does not allow you to modify it down. They do not have any model that says X number infringements equals this diminution in customers. They don't have that.

13:26:07

THE COURT: How about the disgorgement that Mr. Simmons referred to?

13:26:31

MR. PARKER: Well, the disgorgement is entirety. So for example, if you said five headnotes out of the 21,000 -- let's just posit that -- no key numbers compilation, none of that five headnotes. Right now they are asking us to disgorge everything. Right? Their damages model is not dependent - is not formulated to say if it's X number of headnotes, then Y. It's, again, premised on all of them are infringed. But that's what it is.

13:26:45

In any case, we --

13:27:07

THE COURT: It wouldn't be a barrier for summary judgement. It would just mean a trial that would not just be pure damages but require liability findings on a whole bunch of other headnotes.

MR. PARKER: No, it would require trial on every other piece of their copyright, that's what it would require. It would not be a damage -- I mean, granting summary judgement on what they've given you to do, you can't. But it would not be a trial on damages, it would be an infringement trial.

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13:27:43

Granting summary judgement on the five doesn't save anybody any work and they haven't done what they need to do to get the Court to that place. Now, if the Court orders us to create a chart, put it together, happy to. But that's -- that is what needs to be done.

13:27:58

Not this and not telling me that Dr. Krein, who got to do a late report, which we don't get to respond to, is now in play, so that we're now talking about 21,000 headnotes. I mean, I thought we were just talking about 5,000. And again, 1,000 of those headnotes were never accused in this case.

13:28:16

THE COURT: All right. You have a procedural objection on that. What if I gave you notice and opportunity to be heard and the Court brings those up sua sponte? Like, I will give with you another 14 days if you want to --

13:28:29

MR. PARKER: I am actually saying something a little bit more than that. One, procedurally, it's done. But two, you still need a side-by-side -- to give me 14 days on those doesn't answer any of the questions I've posed as to the entire lot.

13:28:43

THE COURT: Right. Fair enough.

MR. PARKER: Thank you.

13:28:53

THE COURT: I will give Mr. Simmons a chance to respond.

MR. SIMMONS: Your Honor, the answer is no, no, no, no no. That is a completely backwards way of looking at what happened here.

13:29:30

So first, let me start with the

side-by-side comparison. Because I have those, they are in the record, and they are available to everybody who wants them. The 5,000 headnotes are D.I. 678-27.

THE COURT: That's the 5,367?

13:29:50 MR. SIMMONS: Yes.

THE COURT: 678-27.

MR. SIMMONS: The 2,830 are D.I. 67821.

THE COURT: 21. That's the 2,830 that Barbara Frederiksen-Cross --

13:29:58 MR. SIMMONS: Correct.

THE COURT: I was told algorithmically could not say or could not deny were at least as close or almost identical to the headnotes that weren't verbatim --

13:30:17 MR. SIMMONS: That's right. She had a methodology by which she was determining what was too close to an opinion and too close to a question.

THE COURT: Are these two column charts side-by-side?

13:30:27 MR. SIMMONS: I believe that they are, but I'd have to go back and check.

THE COURT: The other thing that would be helpful is I don't know whether it would be necessary to also look at the opinion as a whole. Is the name of the

13:30:36 opinion in there, hyperlinked, anything like that?

MR. SIMMONS: I know some of the charts do have that. I can't remember if those two do.

The last chart I'd give you is also one I mentioned earlier at 690, 6 to 11. That is the Krein Appendix B, which is the most robust. It has every single thing you could possibly want in it. But I do know that in Krein, Appendix D, from his rebuttal report, which I do not have the D.I. number for but I can find, that does have the judicial opinions, everything you need to find that. So that's in the record, I just don't have the D.I. in front of me.

THE COURT: All right. But there is one that has the side-by-side for headnote question and entire opinion.

MR. SIMMONS: At least the quoted judicial opinion text.

THE COURT: The passage?

MR. SIMMONS: The passage. And that is Appendix B to Krein's supplemental report.

THE COURT: Appendix --

MR. SIMMONS: B.

THE COURT: I thought B was 690, 6 through 11.

MR. SIMMONS: Yes, that's B. And that one has everything at the most robust. All I was saying

is that Appendix D to his rebuttal, which I don't have the D.I. for, has I know the specific cases cited, if you want to to go back to the judicial opinion and --

THE COURT: I see. Put B and D together.

13:31:46 MR. SIMMONS: No, you could do it all with B. I'm just saying there's another one out there if you wanted to go all the way back to judicial opinion.

THE COURT: Okay. Got it.

13:31:49 MR. SIMMONS: I don't think you need to do that.

Number two, they got the chance to respond to Appendix B. The Canter declaration that I just discussed at 717 is specifically their response to

13:32:02 that. It is not a situation where they didn't get an opportunity to respond.

And by the way, they shouldn't get a chance to redo it now. Procedurally, that would be a prejudice to us because we've now gone through all of

13:32:14 summary judgement, we've gone -- we actually almost went to trial on the basis of them being ordered to tell you what was quoting from a judicial opinion or varying from it. They got their shot. They got another shot in the Canter declaration, and even then there's 4,000

13:32:28 headnotes in there.

So we should not go back, that would be itself a procedural prejudice on us. We are entitled at this point to say the record is closed, they didn't do what they had to do.

13:32:41 THE COURT: Where is this 4,000 number coming from?

MR. SIMMONS: So the Canter declaration, which again is 717, takes the 5,000 number that we were discussing -- and it's in Jonathan Krein's Appendix B,

13:32:54 which is what's cited in the declaration, and then says, oh, there is a thousand other things that we think should come out for one reason or another. You subtract 1,000 from 5,000, you get the 4,000.

THE COURT: Does that take out the ones

13:33:08 they say headnotes that don't exist, headnotes that are pre 1927 and copyrightable opinion, et cetera?

MR. SIMMONS: Yes. So it says, do not exist in judicial opinion, predates, verbatim copies, near verbatim, no copying, minimum questions with

13:33:23 minimum overlap, no previously identified -- the whole list, you know, we can disagree with that, but for summary judgement -- like, you know, giving them the benefit of the doubt of the attorney declaration they put in, that only gets you 1,161. That leaves me 4,000

13:33:41 headnotes that we seem to all agree, and having had the

benefit of putting in an attorney declaration explaining why, they couldn't say we're not protectable.

THE COURT: Okay. And is there a side-by-side chart for those or it's just a subset of 5,367?

13:33:53

MR. SIMMONS: That has charts in it as well.

THE COURT: Okay. But Canter declaration, 717?

13:33:57

MR. SIMMONS: Yeah. What I don't recall is whether the ones -- that has the ones that they are saying are out, referring back to Appendix B, so you would have to cross-list. But the point is, they only remove that 1,000, there's 4,000 left.

13:34:11

THE COURT: Even if we go through the 5,367 and strike out the 1,161 that Canter --

MR. SIMMONS: Correct.

THE COURT: Got it.

MR. SIMMONS: Next I want to point out --

13:34:19

and I was wondering whether this would come up -- it is the burden question on substantial similarity. It is not our burden, it is their burden. We, as the copyright owner, said, here is what we think was copied and we gave you a chart. That then turns to them to say

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why they think it's not protectable, which the

filtration briefing was a good way of doing -- turned out to be a good way of doing that. But I could give you citations for that. First --

THE COURT: But I think their point is

13:34:45 because the copying -- it's clear that there was copying to the deletes, but the evidence of actual copying here is that this is so close, so you've got to show that this was copied.

MR. SIMMONS: So two things there.

13:35:10 Actual copying, under Skidmore versus Led Zeppelin, which is a Ninth Circuit opinion, says that: "Actual copy with probative similarity" -- are you looking at it there? -- "is protectable and unprotectable elements."

13:35:25 It doesn't matter for purposes of actual copying any of the filtration. They don't get to do any of that at the actual copying step. It's irrelevant.

And when we get to six, I will tell you that again, because that is a key way of making it easy

13:35:39 for the Court on actual copying.

We all agree that there is a lot of similarity there. We are done on actual copying. The only place filtration comes in is at substantive similarity after the fact, and that is their burden.

13:35:51 We have that burden because of the

statute 17 U.S.C. 410(c). We get a presumption of validity; they have to come back and say why it's not valid. The legislative history says the same.

And then there are cases in every circuit I could find. The one I liked the best is Compulife Software versus Newman. That's 959 F.3d 1288 at 1305 to 1306. That is the Eleventh Circuit, where it says: "Copyright owner says what was copied. The defendant says here's why it's unprotectable," and then it shifts back.

So here we said it was copied, they put full in a filtration brief or whatever, and that's it. If they don't say something is unprotectable, we move past protection and we just say it's infringement.

Other cases, should you want them, invoicing the bank, that's Boissin v. Banion; that's 273 F.3d 262 at 269, Second Circuit. Same thing: The Court says, You have a certificate. It gives you a presumption of validity, so the defendant's burden is to come forward.

Brocade versus A10 at 2011 Westlaw 7563043 at 2.

Society of Holy Transfiguration Monastery versus Gregory. That is the First Circuit, 689 F.3d 29 at 52.

So it's not our burden once we get substantial similarity. So just -- I want to make sure we are all working from the same legal test.

In terms of the quote from the brief that my friend on the other side was quoting from, remember, in our reply we showed that actually they had truncated the judicial opinion and that, in fact, the West headnote is different than what they say.

Again, the headnotes themselves supersede all of this because there is not any testimony that changes them. All of this is just looking at them. So the Court can look at Appendix B to the Krein declaration and say, Yeah, this is similar, this is not similar, and decide it. There is not any factual dispute. It's just do you agree that legally truncating, reversing order, is protectable, and that decides the issue.

THE COURT: But ultimately you're not taking issue with Mr. Parker's point that the Court needs to go through each of these notes.

MR. SIMMONS: Well, I think the Court can use -- we said this -- the Krein declaration. He is not opining on substantial similarity; he's categorizing the differences between them.

So you can go and pull those out. But

our point is no one has debated the categories. Even in the Canter declaration, Dr. Krein's supplemental report, they don't say he miscategorized things. They just say here are some other things we want to pull out. So if
13:38:36 you take the categories, again, it's fine to extrapolate.

The last thing I want to talk about is the damages model again. I would recommend to the Court that it should not reach it because that's not what the
13:38:48 parties briefed, but in looking ahead, a couple things. On discouragement, our only burden under the statute, 504(b), is to prove their revenues, then they do expenses and apportionments. So that is not my burden to do any of that work. That does not turn this into an
13:39:04 infringement case.

Two, on actual damages, as I mentioned and was confirmed for me at the break, the actual damages model does not turn on which headnotes are not taken. The actual damages model is based on the harm
13:39:20 and loss to profits Westlaw suffered from the ROSS bulk memo project. That is an actual damages calculation based on fees that weren't paid to Westlaw. That is something that would be proved up at trial.

THE COURT: But the threshold then is
13:39:35 just more than de minimus?

MR. SIMMONS: Yes. They copied. They created a bulk memo project and infringing -- we argue an infringing platform. And the question is, what are the damages that resulted from that? And our damages
13:39:50 expert and technical estimates would say, yeah, once you didn't pay us the fees that you normally would pay, we should have gotten that money. And yeah, there would be a trial and the jury would have to reach a conclusion about that for sure, but that doesn't change this into a
13:40:07 mini trial on infringement.

You would come in and say to the jurors, I found that there was infringement. You can even say, you know, it's not all of Westlaw, but there was infringement here. And then our burden is to prove
13:40:18 actual damages; their burden is to prove deductions on disgorgement or we could just seek statutory damages, and then the jury decides.

It doesn't have to be -- you know, there are burdens there, we will have to prove things, but we
13:40:31 can make easier for them by taking the direct infringement question off the table and then just having the experts go at it.

THE COURT: Talk a little more about how I am supposed to figure out what is more than de minimus
13:40:44 here.

MR. SIMMONS: We are talking about thousands of headnotes that are long sentences. In Harper & Row, which my friend on the other side mentioned, it was like 300 words, so I think we're well
13:40:55 past that threshold. So I don't think it requires a significant debate about what de minimus would be.

If we were talking about a sentence, which is where that line often is, like if you just took a sentence out of a book, maybe there is a debate of is
13:41:14 that di minimus copying. Thousands of sentences has never been de minimus and no one has ever suggested that.

THE COURT: So if I thought that the way in which I find that something is more than de minimus
13:41:30 has an influence on a damages model, right, that -- a model of reduced subscriber revenue would involve taking enough stuff that people feel like they can migrate to a header, that might -- is that something I would need to make a finding of at this stage?

13:41:50 MR. SIMMONS: No. First of all, you wouldn't make a finding because it wasn't raised in the briefing.

Second of all, damages is one of those areas that is quintessentially fact bound and you don't
13:42:00 always give them to the jury. So Your Honor should

instruct the jury that to prove actual damages, we are required to show the but-for world that causes the damages model, and then the jury decides whether they think that's right or not.

13:42:13 My friends on the other side will say, no, that couldn't possibly be. We will say yes. And that is a quintessential jury question. Then the debate between the two experts on damages, that happens in every IP case and I don't think it's particularly

13:42:29 burdensome for the jury to listen to them and decide based on cross-examination and credibility, whether they think it's credible or not.

THE COURT: Just a moment.

(Brief pause.)

13:42:36 MR. SIMMONS: I suspect we're talking about the same thing. We found Appendix D. It's D.I. 678-27. So that's the other spreadsheet with all the case numbers.

THE COURT: Right. Okay. So I looked at

13:44:05 678-21, the 2830 that we were just looking at. That looks satisfactory.

Let me just pull up 678-27 and just confirm whether that has, you know, enough. If it has the same columns and the same information, that will be

13:44:19 sufficient for the Court.

(Brief pause.)

THE COURT: At the moment -- I mean, it's -- look at the charts. If the Court wants some further charts or adding additional columns of the charts, I'll...

13:46:16

MR. SIMMONS: Thank you, Your Honor. Would you like us to proceed to Question 5?

THE COURT: No. I wanted to give Mr. Parker the last word.

13:46:24

MR. SIMMONS: Okay.

MR. PARKER: A few different things.

First of all, Krein exhibit, Appendix B, we have not had an opportunity to respond to that. That was submitted in response to the filtration hearing. It

13:46:43

is not moved for -- the next Krein, Exhibit D, does not have anything about judicial opinions in there at all and we would need that opportunity to add those. They have the burden of showing that we copied from the headnotes. They can't just say the headnote in the

13:47:00

question looks similar. We've shown you an example of where the judicial opinion itself uses the words.

THE COURT: Right. This is the thing that I noticed just now in reviewing them. D.I. 678-21 is the 2830 and that does have headnote, memo question,

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section of payment. And you're saying that if I were to

use Appendix D, 678-27, you would also want to have the column in that - an additional column with a citation to an opinion, but it should have the actual passage from the opinion that allows me to see how each of those two selections relates to the piece of text.

MR. PARKER: Yes.

THE COURT: Yes, I understand.

MR. PARKER: Oh, I know. One last thing. De minimus copying. Citing to Harper & Row does not help you. Harper & Row is the heart of the matter case. So you can't say 33 -- the amount that was copied in Harper & Row somehow could inform this decision. There are 28 million headnotes. 28 million. To say that 5,000 is the heart of the matter --

THE COURT: Well -- okay.

MR. PARKER: There is not a case that they cite that gives you guidance as to what is enough in a context like this where a headnote from -- one headnote from a case, that wouldn't apply to another case, is somehow enough if we're talking about the words.

If we're talking about headnotes, how they fit in the compilation because they're connected, that is a compilation. We know you have to get a lot more than some one percent of all the headnotes in that

sense.

So I am just cautioning the Court. Like, Harper & Row is a book where they quoted the best thing out of the book, right? And in the book it's different, but it's the best thing out of the book. And it was an unpublished manuscript. But the best thing, they're like, who is going to want to read that now? They just don't have that where because there are 5,000 headnotes, suddenly no one wants to use Westlaw. They just don't have that at all.

THE COURT: Okay. Very good.

Question 5: The circumstances under which it is appropriate for the judge to resolve substantial similarity at summary judgement rather than leave it to a jury, and I wanted specific citations to case law.

MR. SIMMONS: Your Honor, courts routinely find that two works are substantially similar without requiring a jury. Just the level set. As with other issues that are presented for summary judgement, the question is whether there are genuine disputes as to material facts. When the facts are not disputed, just the legal interpretations of them, summary judgement is appropriate.

So for example, in TD Bank vs. Hill, the

Third Circuit held that the district court correctly granted summary judgement on copyright infringement. That's 928 F.3d 259, 277. Neither the Third Circuit nor the district court that affirmed applied special
13:50:12 standard. Instead, the courts considered the defendant's arguments that --

(Court reporter interruption.)

MR. SIMMONS: I'm sorry.

The Court considered the defendant's
13:50:24 arguments that the material they copied was unprotectable under the merger or set of fair doctrines. And because there were numerous ways to express the life story and business philosophy at issue, they did not apply. Thus, the copied material was protectable and
13:50:39 summary judgement was appropriate. That's at 278.

The same thing happened in a case Ms. Cendali and I had in the District of New Jersey. That is in Tetris versus Xio Interactive. The Court considered the defendant's arguments for holding that
13:50:53 the copy material from Tetris, the video game, was unprotectable under the idea, merger, Santa Fer, game mechanics doctrines. It filtered out the unprotectable material and then compared what remained. And as they were substantially similar, the Court granted summary
13:51:09 judgment. That's 863 F. Supp. 2d 394, starting at 408.

And that's true cross the country.

In the First Circuit, courts affirmed grants of summary judgement in Society of The Holy Transfiguration Monastery vs. Rayon(sic), that's 689 F.3d 29; TMTV vs. Mass Productions, 645 F.3d 464; and Segrets vs. Gillman Knitwear, 207 F.3d 56, in all of those cases rejecting the defendant's unprotectability arguments and finding that works had differences that would be overlooked were not significant.

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In the Second Circuit, summary judgement was affirmed in Castle Rock Entertainment vs. Carol Publishing Group.

(Court reporter interruption.)

MR. SIMMONS: I'm sorry.

13:52:03

That's 150 F.3d 132; Lipton vs. Nature, 71 F.3d 464; and Twin Peaks vs. Nations Publication(Sic), 996 F.2d 1366.

In the Seventh Circuit, it's GCW(Sic) Investments vs. Novelty, that's 482 F.3d 910.

13:52:25

And in the Ninth Circuit, it's Unicolors vs. Urban Outfitters, 853 F.3d 980. Those are just appellate decisions. There are, of course, numerous district courts that view the same way.

Here, Thomson Reuters moved for summary judgement, and ROSS has not established that there was a

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genuine dispute about its defenses because of the unrebutted testimony of Thomson Reuters' attorney editors on the various points of judgment and creativity involved in creating the copied material -- that is in
13:52:55 Oliver declaration that we keep discussing -- or the unlimited choices availability to them, as ROSS's own expert, Dr. Lighter, we discussed earlier, admitted in his deposition. And it's discussed in our opening brief at pages 22 to 24.

13:53:15 And what he pointed out specifically was that many different legal research platforms have no headnotes, their own headnotes, a different number, different wording of them. And given that the Court need only apply the law to the undisputed facts, there
13:53:33 is another -- this is another case where summary judgement is appropriate given the close relationship between the headnotes and the memo questions that copied them.

THE COURT: A few questions. So ROSS's
13:53:45 position in its opening brief was expert testimony is irrelevant to decide a substantial similarity. You, in your opening brief, disagreed.

What's the correct interplay of the opinion of experts and those of lay observers like
13:54:00 jurors.

MR. SIMMONS: So I will give you the expert and lay -- I'd also like to include the Court in that because all three of them can be involved.

So at the actual copying stage, everyone
13:54:11 agrees experts are involved. At substantial similarity, there are cases where courts have said this is complex, we want to have experts involved. The classic example is computer programs, but there is no reason to believe that's restricted to them because of the nature of the
13:54:28 computer program, it's because the judge or the lay observer would need help collecting all the material together.

To be clear, as I said before, our experts are not doing the substantial similarity
13:54:43 analyst. What they're doing is showing here is what all the things are in these categories factually what's going on, and then it's for the fact finder to decide.

What the jury or judge can then do is say, are these substantially similar? Basically you as
13:54:59 Your Honor could do, like all these other cases, is say, okay, ROSS's burden was to say what was unprotectable, they didn't do that for these; or I disagree with their position on merger or summary fares as a legal matter, the rest is in; and look at them, they look similar
13:55:17 enough, direct infringement.

THE COURT: So a lot of cases like Tanksley say substantial similarity, it's usually an extremely close question of fact, that's why summary judgement has been traditionally disfavored in the copyright.

13:55:32

Why isn't there a close factual question here?

MR. SIMMONS: So that's interesting. So that quote comes from I think -- the earliest case I remember is Arnold versus Porter from the 1940s. I actually think the courts have moved quite a pace from that understanding. They don't just deal with substantial similarity at summary judgement. They're not doing it motions to dismiss stage where courts will actually say the works are in front of me, I can decide that and I will make a determination. The Peter F. Geiger case I mentioned earlier from the Second Circuit was sort of a big decision in that area where they said I can do this, I can do substantial similarity without any discovery, without any facts.

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Here, the reason you can do it is we don't have the kind of testimony of the curettage in dispute. So for example, you can imagine a case where whether or not something is a common trope of a book of fiction -- and I'm saying that that was copied -- is

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debated. But there is two experts or two people saying, no, it is a trope; no, it's not a trope. That is not ROSS's argument.

ROSS's argument here is these are too close to the judicial opinions. But we have the judicial opinions, we have the headnotes, and we have the quotes. There is no disputed issue of fact on that, so the Court can easily look at them and decide for itself.

13:56:49 THE COURT: Okay. Walk me through substantial similarity for the key number system.

MR. SIMMONS: The key number system works the same way as the other parts of the analysis work. The question is, what was original to us? Here, our point is it's the whole thing, it is a textonomy, but it's also made up of all of these parts.

They, in creating their bulk memos, named every single bulk memo after the key number system. So like, everyone would have our numerical thresholds in them. And then, of course, as the headnotes were created, what they were doing was marching through that process. There is no question that that was copying there. I think the headnotes are the easier thing to sort of seek through text, but it's clear the key number system was copied as well.

THE COURT: So ROSS says procedurally you didn't raise 1,623 of the 2,830 from Frederiksen-Cross. What is your response?

MR. SIMMONS: We did. But also, remember, we had a lot more submissions since the original raising of this, so there were -- a filtration hearing, there was supplemental Krein declaration. So again, I go back to what I think what the Court should do is look at Appendix B to the supplemental Krein declaration where it has the judicial opinion text, the headnote, the question. That's all Your Honor needs to do. They tried to filter that out of the Canter declaration, they didn't filter it all out, we win.

THE COURT: So take the 2,830 in Krein Appendix B, which I guess is 678-21. At most, filter out the 1,161 from the Canter declaration. And what's left, there is infringement at least as to that.

MR. SIMMONS: As we discussed earlier, I have a thousand of headnotes in every single way we cross this bridge because there's so much copying. I don't think Your Honor needs to go through every single thing to get there, you just have to say that there's more than de minimus copying and let's move on to the other parts of the case.

THE COURT: Okay.

MR. PARKER: At the heart, this isn't really an argument about whether you can grant summary judgement or not. Right? Unicolor tells you that granting summary judgement for infringement in favor of a plaintiff is the exceptional circumstance. Nimmer tells you at Section 12.10 that if the resemblance is overwhelming, you should grant summary judgement. In footnote 76, notes that it rarely happens in favor of plaintiff and usually on substantial similarity it's been in favor of the defendant.

And in each of the cases that were cited, the correlation was obvious. So TD Bank copied 16 percent, side-by-side comparison in Unicolors. So overwhelmingly identical fabric designs. Range Rd. Music, the entire song was played. It wasn't a matter of parsing anything. Association of American Medical, a side-by-side comparison was done by the court. The original aspects of the MCAT had been improperly appropriated. Side-by-side comparison, the court said there was no difference. So we are not at that stage.

We are at a stage, though, where -- again, I will say it again, we would like to respond to the Krein supplemental. But moreover, this case also raises the issue of copying, and that's the example we talked about last time.

It's not merely whether some aspect of a headnote is created. The headnotes are, based on judicial opinions.

I want to make sure I didn't hear something wrong. There are some memos that have a legal -- in the metadata, have a legal phase. They call that their key number system. It doesn't have a key number. And key numbers aren't obvious from any of the bulk memo. Not even every bulk memo had such a thing.

A small amount of the 25,000 -- it's in our brief. I want to say a thousand, I just don't want to get caught by saying I am diminishing it overly much. I just don't -- but those memos don't actually have a time in any obvious way. Most of them, with anything, that would be the key number system, not that ROSS would have received.

So it's a false statement to say that these memos contain reference to key number systems. In the metadata itself -- not even when you read the memo, in the metadata, there is a reference to an area of law. For now they want to call that a key number system. I think that is a fair question if the Court does not -- the Court is -- whether that is actually the key number system and my guys considered the key number system and whether they actually had anything to do with that at

all, I think that is a question for the jury.

So we can talk until we're blue in the face about whether or not you can grant summary judgement. Of course you can in the right case.

14:02:42 THE COURT: So talk about the interplay from the observer. Isn't this fundamentally the judgement call about how much they look alike? We are not talking about computer code here. Mr. Simmons makes a fair point.

14:02:52 Isn't that a factual determination where when it's close the jury makes it, when it's clear to the naked eye of the judge, the judge can make it?

MR. PARKER: Oh, yeah. Listen, I'm saying our expert -- neither expert is a legal expert in

14:03:08 any way, shape or form. You can tell whether something is a trivial -- when it says Rule 54(b) and the headnote says a motion under Rule 54. Or if the Court says in a 12(b)(6) motion, and the headnote says in a motion to dismiss. You are better equipped to tell me if that is

14:03:33 similar or a trivial variation than Dr. Krein is and certainly Dr. Frederiksen-Cross, who didn't look at it at that level.

So it is unavoidable that you're going to look at it if you want to, right? And I think you're

14:03:51 given the opportunity to do that, frankly, under the

case law. We just want you equipped with the right things to do so.

THE COURT: Fair.

Now, Ms. Frederiksen-Cross, your expert, describes 2,830 of the headnotes. Is that a concession on substantial similarity?

MR. PARKER: No.

THE COURT: Why shouldn't I treat it that way?

MR. PARKER: Because you have to look at the actual words used and what portion was used. Again, we are going back to -- she's just mentioned how many words are similar. So the example on page 2 of -- in their brief but on page 2, if you did that comparison, there are more words that are dissimilar than are similar. But the words that were actually made into the question also appear in the judicial text. It is not an admission of anything. And it is a substantial similarity of why. And I think that's -- what portion of the headnote, like where, what are we talking about?

She doesn't get you to that. And then what was actually copied, she doesn't get you there either.

THE COURT: All right. Mr. Simmons.

MR. SIMMONS: So on the question of how

close they have to be, I commend to the Court Castle Rock, which is one of the cases I mentioned. That is the Seinfeld Aptitude Test case. There wasn't even side-by-side comparison there. Those are a TV show and a quiz book that had only 643 fragments, is the way that the court describes what was copying, and says that's more than de minimus and found and affirmed substantial similarity by the district court, finding it on summary judgment. So you don't have to do a whole lot of work to make this happen.

14:05:26

14:05:44

Secondly, you have to really be careful about when we are talking about actual copying or we're talking about substantial similarity. Actual copying, as I said, we don't do any of the filtration analysis.

14:05:58

I'll come back to that --

THE COURT: We had that last time and I haven't heard Mr. Parker to dispute that we can look at the whole thing of actual copying, substantial similarity is where we filter.

14:06:03

MR. SIMMONS: Correct. And so in the substantial similarity step, we said here is what was copied; they're supposed to say what they think was unprotectable, and then we respond. That's happened multiple times. Ms. Frederiksen-Cross, they chose to have an exert come up and do that analysis.

14:06:19

Do I agree with how she did it? No. That is their expert. But she leaves on the table thousands of headnotes even using the analysis they chose to use. That's why it's relevant for summary judgement, because even if we accept their version of the facts, then we still win.

Even if you thought, though, it is an expert, I'm concerned about that, what you can do is look at the chart of what she did and look for yourself at how similar and different things are, and you can do that comparison that way too. I'm happy to win in any way you want to, to do it, as long as I win.

THE COURT: And you don't have a problem with taking the 1,161 from Canter, do I subtract those from the 2,830 and Frederiksen-Cross?

MR. SIMMONS: So those were already out. So --

THE COURT: If there is any disagreement, I want to know about it. But the 1,161 is a subset of 5,367, but it's not a subset of the 2,830?

MR. SIMMONS: Right. So 2,830 is here is Frederiksen-Cross's analysis where I walked her through and said, okay, well, if we accept it, how does this work out --

THE COURT: So the 1,161 had already

been --

MR. SIMMONS: It is a response to our Krein Appendix B. So their version is Frederiksen-Cross, I then said, okay, at her deposition, walk we me through your analysis --

14:07:38

THE COURT: Took her on her own terms on the --

MR. SIMMONS: Correct. And that gets you to a thousand.

14:07:45

During the Daubert point -- remember Frederiksen-Cross had essentially a sur-rebuttal, Your Honor permitted it but let us have a supplement in response to it. The supplemental Dr. Krein report contains Appendix B, which as I said, is I think the

14:08:03

best way of looking at this because it has the judicial opinions, the headnotes, and quotes, and the categorization. The Canter declaration at summary judgement then responds to that, and that's where the thousand is coming out of.

14:08:12

THE COURT: The thousand is coming out of --

MR. SIMMONS: Appendix B.

THE COURT: I thought Appendix B was the 2,830.

14:08:36

MR. SIMMONS: No.

THE COURT: The Appendix B is the 5,367?

MR. SIMMONS: Appendix B is Jonathan Krein using all of the --

THE COURT: Is that D.I. 678-21?

14:08:43 MR. SIMMONS: That's 690-6 through 11.

THE COURT: 690-6 through 11.

MR. SIMMONS: That's Jonathan Krein. Frederiksen-Cross, which is the standalone, is 678-21. The 5,000 is what happens if you subtract out -- it is

14:09:08 taking our headnotes, they then said here are the ones we think are unprotectable, and that leaves you with 5,367.

THE COURT: That is D.I. 678-27.

MR. SIMMONS: Correct.

14:09:25 THE COURT: But the 690-6 to 11 is the -- the Krein Appendix B has the same --

MR. SIMMONS: It's got everything, everything that you could possibly need, and then sortables that you can find it on. So that to me is the

14:09:41 easiest because it gives you the full -- and then you can find judicial opinions and see everything. The Krein -- I'm sorry, the 5,000 or the 2,000 are our attempts to say don't take my word for it, let's use their numbers, and we can still win. Because I didn't

14:09:59 want to come in and tell Your Honor just do it my way

because you might think that's somehow creating a fact issue.

THE COURT: D.I. 696-11 is a spreadsheet. You may have logged a digital copy of this, but can you get your paralegal just to follow up with a thumb drive or some kind of link to the large file because the capability of sorting and searching may prove useful.

MR. SIMMONS: Sure. Absolutely. I think it is a spreadsheet, like a normal Excel, so you should be able to just load it.

THE COURT: Right. That looks like it's text, like a PDF. I'm saying if it is in an Excel form, it would be sortable, categorizable, subtractable, et cetera, in ways that the PDF is not.

MR. SIMMONS: We will get that to you.

THE COURT: Okay.

MR. PARKER: We are going to put all the cards on the table and we should. Their motion starts with we admitted because we didn't provide things to you because under the virtual identity we didn't make any admission at all.

THE COURT: Right.

MR. PARKER: Right. And so they start with that premise. We say, you have to do a side-by-side.

Now, the -- Krein does not have all the 5,000 because we didn't -- Krein was responding to our filtration, which was 16,000. And I'm just telling you now, by the time we finish talking about what numbers should be subtracted from another number, I don't even know what we're moving on.

14:11:31

If the Court wants to do this, then let's just put our money where our mouth is. We'll give you the quote, we'll give you the headnote, we will give you the judicial opinion, and the Court can go to town.

14:11:46

THE COURT: Right. I already have that in 678-21.

MR. PARKER: No, you don't have everything. I'm saying put it in one place. Krein's supplemental B doesn't have everything, Barbara Frederiksen-Cross doesn't have everything. We just put it all in one place. We will agree what the words are and we'll do it. We'll eliminate the 86 headnotes. Because they were sitting there in the 5,000. Right?

14:12:01

14:12:21

We'll eliminate -- there may be an argument about whether any or some of these headnotes even are subject to copyright. Because you can't keep extending copyright on a work even if it sits in a compilation.

Rather than -- I literally don't know which things are now in play. And we sit here and say

14:12:37

subtract this from that and look over here for some of it, but it doesn't have it all but look --

THE COURT: The Court is going to do a side-by-side. And the Court is going to do a

14:12:49 side-by-side involving, you know, headnote and opinion -- now, it sounds like that is -- I thought I looked at that in D.I. 678-21.

MR. PARKER: I will check. I am almost certain that is not true. I am going to literally say

14:13:06 almost certain, but I believe that is not so.

THE COURT: All right.

MR. PARKER: It won't have the judicial --

THE COURT: At the next break, let's have

14:13:14 the paralegals check both of these and see what you agree has all three and what doesn't. And if you -- I get your argument that the Court ought to be checking these things. I thought I just saw a document that purported to be one of the smaller of the spreadsheets

14:13:33 that had the three columns of all of these things where the Court can just go and like, yes, this looks like the judicial opinion; and no, this is not more than -- you know, the bulk memo is worse than the headnote.

MR. PARKER: Understood.

14:13:47 THE COURT: But apparent to the naked

eye. And the Court will make sure it has that, but I think the first thing to do is for the paralegals to get on the same page about what is in each of those three attachments. Because I thought I was just looking --

14:13:59 MR. PARKER: And if you may -- I am 3,000 miles from home. I would prefer if we were allowed to just meet and confer outside of the school and submit an e-mail to whomever you direct. And we can say -- and if we have an argument, which I think we

14:14:18 might, we will deal with it.

MS. CENDALI: Yes. Your Honor, may I be heard briefly on this?

THE COURT: Yes.

MS. CENDALI: It's been extremely

14:14:27 prejudicial for us the way they keep changing the sands. We're here now, everything has been submitted. They had optimal opportunity to do everything. The document speaks for itself. There shouldn't be a supplemental e-mail. People can talk during the next break and the

14:14:45 document is what it is. We're just --

THE COURT: I hope you guys can meet and confer. I'll make the next break a prolonged one, if needed, so that you can agree at least here is what we all agree that this D.I. -- attachment to this D.I.

14:14:56 number is. And if it has the relevant categories that

Mr. Parker is asking about, that may be sufficient.

I understand his point that some of these don't. And if the Court were to go to such a thing, there is this question about whether ROSS should have raised this earlier, submitted something else. But the Court is in a position, I believe, to at least do a comparison on the subset of what looked to me like the 2830 with the three columns.

MS. CENDALI: Yes. That's what we believe. We believe that Your Honor has everything it needs.

But I just wanted in the -- one more time because I feel like, as we talk about this, something is lost. I want to go back to our conversation about Feist and the fact that the Court said that even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection and features an original selection and arrangement. Your Honor is obviously free to also look to see for some of these headnotes, you know, to what extent do they track the judicial opinion or not and that's fine. But the point is, all of the headnotes, 20,000 plus, which you heard Mr. Parker admit were copied, all of them are protectable because it doesn't matter --

THE COURT: I understand. But your briefing it and Mr. Simmons are taking the both/and approach. I have to decide on compilation and I have to decide on the individual works.

14:16:27 MS. CENDALI: Yes. We're saying that, I guess, there's two paths --

THE COURT: Yes.

MS. CENDALI: But the point is that the -- that was the selection and arrangement. I just

14:16:37 wanted to --

THE COURT: I understand your argument. It's been made. I think this is now sufficiently clear to the Court --

MS. CENDALI: Thank you.

14:16:43 THE COURT: -- what the positions are, what the arguments are. And I will certainly give you guys some time to meet and confer, but we just have to be sure about what it is that I'm looking at and what it is that I have the ability to do this comparison as a

14:16:57 factual matter.

This is not computer code. I am a judge. I read headnotes. I can tell when headnotes are close to judicial opinions and what, if anything, they are adding or what they are selecting and arranging.

14:17:09 MR. PARKER: I did not make an admission

on the copying, I just --

THE COURT: I understand you have not made a concession on that, you're not making an admission on copying.

14:17:18 There is still the issue, I have to decide what to do with Frederiksen-Cross, but your position on that is very clear.

Question 6: Record citations showing either there is no disputed material fact or any

14:17:31 genuinely disputed material fact about actual copying for each of the categories of headnotes including each step. So I want to know about the steps about going from Westlaw to being copied by LegalEase and then having been placed by LegalEase into the bulk memos, and

14:17:46 then the use of the bulk memos by ROSS.

(Brief discussion held off the record.)

(Brief recess taken.)

THE COURT: Topic 6, Mr. Simmons, record citations.

14:22:34 MR. SIMMONS: As the Court's prior summary judgement opinion explained, there are two ways of proving actual copying. One is through direct evidence, such as LegalEase's admissions in its deposition that it copied Westlaw. Those include 678-6

14:22:47 at 34 through 13. We also have Morae Global, which is

the subcontractor, in 678-4 and 195-14 through 19. And there is also documentary evidence such as 678-84, which is an e-mail exchange between the two of them.

Another way to prove actual copying is

14:23:11 proof of access and similarities probative of copying. That's at page 8 of your prior opinion. There is no question on access. LegalEase admitted in its deposition that it had Westlaw credentials. That's at D.I. 678-8 at 93:21 through 24. And Morae Global had

14:23:30 them too. That's 678-6 at 88 through 1922. So access done.

All we have to do in that situation is talk about probative similarities. Earlier I had informed the Court about the Skidmore vs. Led Zeppelin

14:23:46 case. The citation for that is 952 F.3d 1051, 1064. And the quote says there that for purposes of probative similarity, such similarity may be based on the overlap of unprotectible as well as protectable elements. So the teaching of that case is that filtration doesn't

14:24:07 happen at the actual copying stage.

So there's a couple of ways the Court can do this. All the Court needs to do is look at, again my favor, Appendix B to the Krein declaration. That's D.I. 690-6 through 11. That has all of the headnotes and the

14:24:23 questions. If they look similar such that you think

copying occurred, actual copying is established. There are numerous similarities there.

And faced with that, what ROSS would have to have done is said, no, no, no, this was independently created, and that's not an argument that they made. All of the arguments in this case are about unprotectability, not independent creation.

THE COURT: So you can do this from similarity and eyeball it.

MR. SIMMONS: Yep.

THE COURT: But in terms of direct evidence, the alleged copying by LegalEase -- okay, we've got access. It doesn't sound like that's disputed. I thought it wasn't disputed last time and I so found.

But how about what we have direct evidence of as the placement of the copied material, above memos, which Mr. Parker keeps arguing, look, we instructed them, don't use this, write it on your own, et cetera. There are all these instructions. You pointed to --

MR. SIMMONS: The best practices guide.

THE COURT: I think it was more than the best practices guide --

(Simultaneous speakers.)

THE COURT: -- at pages 4, 8, and 13.

MR. SIMMONS: Let me walk you through the best practices guide for ROSS Intelligence, which is D.I. 678-36. I have it, which is what I'm going to read from.

14:25:37

(Discussion held off the record.)

MR. SIMMONS: This is the document that LegalEase created to train it and the Morae Global contractors. Here is how you make a bulk memo.

14:25:54

So Mr. Parker this morning said that there is a reference in this just saying the headnotes are proprietary, which is true, but they also -- the memo also says an easy way of framing questions is to rely on the headnotes. Here are the steps in the best practices guide that LegalEase used.

14:26:11

THE COURT: Who drafted the best practices guide?

MR. SIMMONS: LegalEase. So this is the people who are creating the bulk memos saying this is how you do it.

14:26:20

Page 4, Westlaw. Do a headnote search. "Click on the key numbers. You will be assigned a number which is available under the key numbers."

Now, there is a picture of Westlaw at the top of the page.

14:26:34

"Here, the key number assigned is 1 and the topic is abandoned and lost property." And then it has a picture of the key number system from the Westlaw platform.

14:26:48 "2, click on a key number topic. The best practice is to begin from the top, subtopic number 1, and follow the pattern." And it shows abandoned and lost property and all of the key number citations under that form the Westlaw platform.

14:26:59 "3, click on number 4, evidence and questions for jury," which is one of the key numbers under that.

"4, got this." Which then gives you all the cases that go with that key number.

14:27:11 THE COURT: So this is your proof of the second of the third, three steps I asked about.

MR. SIMMONS: Yes.

THE COURT: How about the third step, the use of bulk memos by ROSS?

14:27:20 MR. SIMMONS: Sure. And I'll just note, by the way, the punch line on this is that step 7 is take headnote and make question. So that's the answer on that. And there is other evidence on that too.

In terms of ROSS's use, this is an area

14:27:32 where the experts are actually oddly in agreement. So

Mr. Krein's rebuttal report at paragraph 34, that's our expert, and Dr. Branting's opening report at paragraph 31 through paragraph 38 described the following process:

Step 1: An individual at ROSS copies and pastes the contents of the memorandum into their portal -- that's what my friend on the other side mentioned earlier -- which would create a copy of the bulk memo in ROSS's web database.

So bulk memo is like a thing that you get sent over -- let's put it in the database, someone at ROSS is putting that into the database -- that question all the other material.

Step 2: An individual at ROSS would assess whether the answers to the questions accurately represent the relevance rating, which would require the user to access the copy of the bulk memo on ROSS's database and create a new copy in the random access memory of the computer.

Because they are confirming that the database is correctly copying the question.

Step 3: The data goes through a mapping process where they verify the passage -- and I'm -- can correct to the judicial opinions that they already had.

And then Step 4: A set of question and the answer pairs that were to be used for training are

downloaded into the CSV file -- that my friend on the other side mentioned earlier, which is just a spreadsheet. And so what that spreadsheet has in it is the list of all the questions and all the judicial
14:28:59 passages -- the great quote material that's there.

And so that was their process for every single bulk memo. There is no question that that involves copying of the memo questions which, as we say, are based on the headnotes.

14:29:13 THE COURT: I understand what you allege ROSS has taken from the headnotes. But clarify, what are you alleging they have taken from the key number system.

MR. SIMMONS: So the key numbers were
14:29:25 also contained in the bulk memos, both in the --

THE COURT: Just metadata were in the files, but not in the text that was being crawled over.

MR. SIMMONS: So the number name was not. But remember, the question and the great quote have a
14:29:39 relationship. And their expert, Dr. Branting, at, I believe it's paragraph 11 of his rebuttal report, if memory serves -- pardon if I'm incorrect -- actually talks about the fact that they're learning -- that they're teaching their AI about the relationship between
14:29:54 the headnote and the case great passage. So yes, it's

in the metadata, the file names, but it's also just the nature of how the bulk memos are created is including all of this different material.

THE COURT: One moment.

14:31:05 (Brief pause.)

THE COURT: All right. So this may be a little repetitive of some things that Ms. Cendali touched on, but try to distill for me, what is the protected aspect of the key number system that you

14:31:17 allege that ROSS took? What is the protected aspect of creativity or protectable elements of the headnotes that you allege were taken? Because I am trying to understand the gist of the claim.

MR. SIMMONS: So there is protection at

14:31:33 multiple levels. The fundamental legal question is what did we add? So anything we added, anything we did is protectable.

For the key number system, we chose the names in the key number system, the organization in

14:31:45 which they appear, the subsets and everything else. It is essentially its own work. It's itself -- it's something that you can actually see in the Westlaw system and say, oh, there's all these key numbers in there. The headnotes, as Ms. Cendali said before the

14:32:00 break, we claim them at the selection arrangement level

because we chose what to make a headnote. But we also claim the text that we wrote where we are taking material and summarizing it, even if there is something that looks similar to the judicial opinions -- you know, in many of the cases we're doing some kind of manipulation that makes it more than trivially different.

14:32:17

In addition, as anyone who uses Westlaw electronically knows, all of the headnotes are linked to the passages of the text. So we have chosen that, not only to make a headnote, but to make a headnote that goes to a specific part of the opinion. It could have been earlier, later, not had a headnote at all, and that is critically important because that paring of our headnote with the judicial text is what becomes the question in great quote in the bulk memos.

14:32:32

14:32:47

THE COURT: Mr. Parker.

MR. PARKER: Oh, my turn. I didn't think that was going to go that fast. I am going to take a little bit longer. And I am going to give you the D.I. cites after. Page 19.

14:33:12

I think we're all good about the best practices guide. You can look at it yourself. But also, there was no quote when it says, "take headnote, make question."

14:33:31

THE COURT: Right.

MR PARKER: As I said to the Court before, "Do not copy headnotes verbatim because headnotes are generally not in the form that was expected for the questions." That is actually a deposition study. Best practices guide comes, was not copy headnotes. There's another document, it's Exhibit 59 from LegalEase. LegalEase directed attorneys to "not to stick to headnotes or frame questions. Rather, use them as a stepping stone."

And I said this earlier, each quote was to represent four rankings. This apparent link to passages -- I am now on page 20. You can look at the bulk memos. There is no apparent link there and they don't claim there is a link in metadata. It is a question and an answer, and then a good top question and an irrelevant question. And Jimoh Ovbiagele's declaration tells you why we are not the training just on great questions. You can't do that with AI. He explains that. But it would be no good to have 25,000 great questions out of a world of how many cases -- I have it written down. Millions and millions of cases in this world, to have 25,000 great answers, that doesn't -- you can't train AI.

THE COURT: So --

MR. PARKER: Go on. I can stop.

THE COURT: You're not disputing access.

MR. PARKER: No.

THE COURT: That is conceded.

14:35:20 Do you dispute that LegalEase actually copied the headnotes at the first step?

MR. PARKER: If you talk about a -- femoral copy. In other words, you open up a Westlaw, you are going to see those things.

14:35:36 THE COURT: Right.

MR. PARKER: You just are. The question, though, I think is twofold. One is, are you using the headnotes to find things like the utility --

THE COURT: But do you concede that, say, 14:35:51 the 2830, or whatever, headnotes were copied by LegalEase into the bulk memos?

MR. PARKER: No.

THE COURT: That they were copied from the screen onto something else in the process of 14:36:02 creating the bulk memos.

MR. PARKER: No. I'm not going to -- that is not in the evidence at all.

THE COURT: How about the use of the bulk memos by ROSS? You concede that ROSS used all the bulk 14:36:13 memos to train in its AI.

MR. PARKER: No, that is not true, either.

THE COURT: Okay.

MR. PARKER: No, not even a little bit.

14:36:18 They discarded some. They didn't match up, or they didn't think they were -- it's in our papers.

THE COURT: They discarded some of them.

MR. PARKER: Yeah.

THE COURT: Do you concede they used the

14:36:24 bulk of them?

THE COURT: Do you concede they used the bulk of them?

MR. PARKER: They used 80 percent.

THE COURT: 80 percent of them, and they

14:36:31 kept the other 20 percent aside?

MR. PARKER: Yes.

THE COURT: Do we have a way of lining up which 80 percent with individual headnotes?

MR. PARKER: No.

14:36:39 THE COURT: Okay. The 80 percent was randomly sampled?

MR. PARKER: Yes.

THE COURT: So statically, if there were thousands, the chance that none of those thousands would

14:36:51 show up in the 80 percent, you can do the math.

MR. PARKER: Right. So, you know, the statement was that we were trying to teach the relationship between a headnote and a great quote. That is just not true.

14:37:04 First, that assumes we copied headnotes verbatim.

THE COURT: Okay.

MR. PARKER: That assumes that the headnotes are not just judicial opinions.

14:37:12 THE COURT: So you conceded that there was a femoral on the screen copied, but nothing from there --

MR. PARKER: Right.

THE COURT: -- yet?

14:37:16 You do?

But you do not concede that it made it from the screen into the bulk memo.

MR. PARKER: Correct.

THE COURT: Right. So that is where the

14:37:23 dispute is, and then there is a dispute about the placement -- you did the copying at the first stage. You dispute that it was placed in the bulk memos. You say -- you concede that 80 percent of the bulk memos were used in the training but you can't say which

14:37:37 80 percent.

MR. PARKER: No. No one can.

THE COURT: But yes, you concede 80 percent were used?

MR. PARKER: Of course. It's in our papers. No question.

14:37:45

THE COURT: Yes. All right.

MR. PARKER: Let's go to the headnote -- I mean, to the key number system in the bulk memo.

So this Court can look at the bulk memo; we have given you an example. There is no key number referenced; there's no synopsis. There's no Westlaw content that is -- you can look it, it's not there. It is a question and an answer.

14:37:56

Of the memos: 1,534 contained a legal copy as a file name. 24,000 or 23,000 and something odd have not been. So the legal topic.

14:38:15

THE COURT: Were the file names or the meta data being used or called or recognized by this AI?

MR. PARKER: No.

THE COURT: No, they were not.

14:38:33

MR. PARKER: And I will tell you how I note that. There's reference to the classified project, which they claim is an infringement. We received -- ROSS sent to -- I mean. Sorry. LegalEase sent to ROSS 91 topics, the highest level topics in the key number

14:38:47

system.

ROSS reduced it to 38 of its own topics because they were trying to figure out if their error would work, if you could take civil procedure cases and label them as civil procedure cases, not in a key number way, but just say this is a civil procedure case. They abandoned them.

There is no evidence at all that their legal search engine had any kind of classification process at all, and, in fact, they say it doesn't, that's it; that is the close of the evidence.

We say with evidence it didn't happen that way, and they still want to maintain that somehow this classified project came through, and it just didn't.

THE COURT: One other question about the 80 percent, 20 percent.

MR. PARKER: Yes.

THE COURT: You say the 20 percent were set aside for cross-checking.

MR. PARKER: Yes.

THE COURT: So they were used at a later stage in the cross-checking.

MR. PARKER: They were used for training and validation of whether or not the featurization was

occurring properly, but in that way, they were used.

THE COURT: So all hundred percent were used, but 80 percent were used --

MR. PARKER: No.

14:39:58 THE COURT: -- upfront and 20 percent later.

MR. PARKER: No. There were memos discarded. I don't know how many; no one knows how many. It's not in the record. 80 percent of what

14:40:05 remained after things were discarded were then used to train 20 percent to use to validate.

THE COURT: So a hundred percent of what was not discarded was used: 80 percent upfront; 20 percent later?

14:40:19 MR. PARKER: Correct.

THE COURT: Who talks about what was discarded in the record, and where would we find anything out about it?

MR. PARKER: Sure. I don't think that

14:40:26 you're going to -- let me see this.

MR. PARKER: Page 22. The -- okay. Late declaration as well as the markets declaration.

ROSS received 500 judicial opinions, and we have already talked about that where ROSS says, we

14:40:59 don't want all of this stuff.

Next: ROSS then extracted the question and answers. They featureised. They tore apart any relationship between the questions and the great quotes or any other quotes because they featureised things in a way that they are just talking about world relationships.

I have talked about featurization and I think we've had enough conversation about that, and none of that is disputed.

14:41:39 I think that's -- I think that may cover it. Do you have any questions?

THE COURT: No, not at all. Not for you. I am going to go back to Mr. Simmons now. Thank you.

Mr. Simmons, what do I do about this

14:41:58 unknown numbers of things that were discarded?

MR. SIMMONS: So it doesn't matter because the copying -- the copying occurred before you even get into the training. So we can talk about the training.

14:42:08 THE COURT: On the vicarious, but on the direct liability.

MR. SIMMONS: No, on direct liability.

As soon as -- all of the memos end up in the CSV file. All of the memos are in the database.

14:42:19 THE COURT: Did all of them go to ROSS?

MR. SIMMONS: Yes. All the -- all the 25,000 we've been talking about go over the transom, end up on ROSS's database, end up in the CSV file.

THE COURT: Okay. Mr. Parker, do you agree?

MR. PARKER: I do. I just don't agree there is a copyright violation by stating the facts.

MR. SIMMONS: Okay. The debate you are having is then at the stage of, okay, we got them, what are we doing with them on the system itself, the training of it exact - itself?

As Mr. Parker indicated, 80 percent were used to train upfront, 20 percent were used for validation. So they are all, again, being copied into it, but it doesn't really matter because at this point, all of those questions are already in the ROSS system, they have already been copied over. So I went on direct infringement at that point. I don't need to go the extra step and say, and then here are the specific ones that went into the training of the ROSS platform.

Even if I did, however, the fact that we have the memos there in the system and the direct evidence that they were used should be enough to get a finding of actual copy.

Again, we don't have to prove every

single thing; we have to prove more than di minimus use, which we have done.

Just a couple of points I had. One was there was a lot of discussion of what ROSS knew or what people were told. None of that matters for direct infringement. This is strict liability. So knowledge and we didn't want doesn't matter. LegalEase did it; they're liable. And ROSS is secondarily directly liable for that result.

14:43:55 THE COURT: There is -- we will talk about infringement later. That's not -- there's liability, but there is a possible defense over there.

MR. SIMMONS: Maybe -- I mean, infringement, although, the copyright notice means that

14:44:06 they don't get one.

But in addition to that, the record is replete with examples of ROSS actually wanting them to use Westlaw. Yes, there is sort of this wink and a nod of don't use it, na, na, na, na. But you see them

14:44:19 giving them Westlaw material over and over again. There's this best practices guide that says, take the headnote and make that into a question. The idea that people weren't using Westlaw is questionable.

And then, just finally, on the key number

14:44:35 system. Again, the metadata and file names copied over,

so I don't have to remove the training of it, but in it, I will direct the Court to D.I. -- I think it's the Miranda Means, first declaration, Exhibit 23, which is the Klein report, that talks about how the raking algorithm at Paragraph 11 learns relevancy from the relationship between the questions and answers.

14:44:57

And then at paragraph 14, it talks about how the key numbers were used to make sure they were getting full coverage of all the issues of law.

14:45:13

Because, as you can imagine, it is a search platform. So the reason you want to make sure you are covering all the things, is, if I know a whole lot about the maritime law and you ask me something about the copyright law, AI might not know anything. So you want to make sure you are getting full coverage of all the issues. That's how the key numbers go used in the system.

14:45:29

THE COURT: Mr. Parker.

MR. PARKER: There is not a lick of evidence that supports any statement that the key numbers were adjusted into the system. There isn't. Of the 25,000 memos, there are legal topics on 1,500. There is literally no evidence that ROSS received a single key number except when they received the 500 judicial opinions, and they said, "We don't want it."

14:45:40

14:46:00

And the only other is that ROSS received 91 topics, and reduced it to 38 of their own topics and then discarded the other.

There is no evidence at all that in the training data there were key numbers or the source code has anything in it. Again, we not only have affirmative statement of that, our expert tried to reverse-engineer to find stuff. They have access to the source code. They could have come and told you, we found it. They are just speculating.

I think that may be it. There is one other thing that I wanted to tell you that's on -- I know. I think I want to be careful about this copying idea. All right. Because I think it's two different things.

LegalEase's copying, meaning the femoral copy, and that is one set of things.

THE COURT: That's conceded.

MR. PARKER: There is another about what ROSS received from LegalEase. LegalEase does not admit to copying -- and I'm referencing -- does not admit to copying headnotes to make them into questions. I have given you that --

THE COURT: Right. That's where the Court then will have to decide whether to infer or just

actual copy.

MR. PARKER: Yes. I am just leery about just saying LegalEase copied, and then that sort of ends at a bunch of queries.

14:47:49 THE COURT: But you also don't dispute what Mr. Simmons says, that the actual copying stage, protectable and unprotectable, too. It is the substantial similarity, I felt they are only protectable.

14:48:01 MR. PARKER: Yes and no. I mean, I think it's careful -- you have to be careful, if the words of the judicial opinion are the same words in a headnote, then you don't know whether the headnote was actually copied, even if you don't filter.

14:48:13 I'm not saying -- we are not arguing whether it's protectable or not. I'm just saying how you can't infer that LegalEase went to the headnote instead of just the judicial opinion.

THE COURT: But the argument, based on

14:48:29 the Frederiksen-Cross chart reads, when the level of similarity of the bulk memo is more similar to the headnote than is -- the original judicial opinion, the logical inference is this was copied.

MR. PARKER: If they use the same words.

14:48:47 THE COURT: Yes.

MR. PARKER: Right?

I mean, that's -- the danger is we can't just say the headnote is dissimilar to the judicial opinion, therefore the headnote must have been copied.

14:48:59 There are instances where the headnote and the judicial opinion and the question -- I don't even know where they got the question from, and there would be great dissimilarities. There are those instances.

14:49:11 So that's why Barb is making some admission by saying, you know, this doesn't add up, to me. I can't find the similarity; it doesn't answer the question. Because literally, the questions are like, who knew? Who knew?

14:49:28 THE COURT: The Court will examine the chart and make the side-by-side comparisons.

THE COURT: I am going to take a recess now until 3:30. I hope that the parties can get the paralegals together and agree upon which sharks have the

14:49:45 relevant three columns in them, because there seems to be disagreement about what I thought I saw with my own eyes, and maybe we are looking at different documents and different D.I.'s, but let's get on the same page about that.

14:50:00 We'll come back at 3:30, and we'll cover

Topics -- Question 7. We will cover a few miscellaneous issues kicking around, and we will cover some trial management. And then I will confer and figure out, you know, are we going to reconvene tomorrow? What follow-up issues there are if we do reconvene tomorrow.

14:50:18

MR. SIMMONS: Your Honor, if I can just -- before you leave, I had mentioned Exhibit 23. That is actually the Branting declaration, that's their expert. You can see the system we were discussing earlier.

14:50:33

THE COURT: In terms of the metadata.

MR. SIMMONS: In terms of use of the key numbers to confirm that they were getting full coverage of the practices.

14:50:41

THE COURT: That they were getting full coverage.

MR. SIMMONS: Yes.

THE COURT: All right. We'll recess until 3:30.

14:50:43

THE DEPUTY CLERK: All rise.

(Recess.)

THE COURT: Before we proceed to question 7, was there anything specifically about the comparison notes on which charts included which column and the like?

16:34:03

MS. CHANG: Good afternoon, Your Honor. Yungmoon Chang on behalf of plaintiffs.

So at the Court's direction attorneys conferred during break and I'm happy to report that ROSS agrees that two of the exhibits that were cited on the record do contain the information requested by the Court. Specifically docket 678,21. This was the exhibit that my colleague Mr. Simmons referenced that he had examined Ms. Barbara Frederiksen-Cross during deposition.

THE COURT: Ms. Frederiksen-Cross 2830 headnotes, correct?

MS. CHANG: That's correct, Your Honor.

THE COURT: And that is different from the various exhibit Bs on or exhibit Ds.

MS. CHANG: Correct, Your Honor, however, the parties do also agree that appendix B to the supplemental Krine report also contains the requested information which is the judicial opinion, the headnote and the memo question. So that's docket entry 690-6 through 11. That's that large 6-piece file.

THE COURT: Yes, that is the 6 pages of the spreadsheet.

And what's the number of headnotes in that one? Is the entire universe of the 25,000?

MS. CHANG: That's correct, Your Honor.

So what we're happy to do for the Court, if the Court would like, is to provide native Excel versions of those spreadsheets.

16:35:32 THE COURT: I want you guys meet, confer, agree this is the same as those items that are already in the record. It's just in a native Excel format rather than a pdf or paper format. And the parties can get the paralegals together and submit that. That would

16:35:49 assist given the volume of headnotes here.

MS. CHANG: We are happy to do that, Your Honor. Thank you.

THE COURT: So who's handling question 7?

MR. SIMMONS: Me again, Your Honor.

16:35:59 THE COURT: Mr. Simmons.

MR. SIMMONS: Your Honor, may I begin.

THE COURT: Yes.

MR. SIMMONS: Rule 54 B is entirely consistent with the law of the case doctrine. There is

16:36:25 no question that under Rule 54 B the Court has the power to revisit its prior rulings.

As Your Honor is aware the rule itself says that any order or decision that adjudicates few than all the claims does not an exempt in the action as

16:36:38 any of the claims can be revisited at any time before

judgment on the claims.

What the law of the case doctrine does is the Supreme Court in Christianson versus Colt Industries explained, is provide a rule of practice for when a Court exercises its discretion that would promote finality and efficiency. That's 486 U.S. 800 at 8916.

In re: Pharmacy Benefit Managers antitrust litigation, the Third Circuit emphasized the importance of maintaining consistency and avoiding reconsideration of matters once decided during the course of a single continuing lawsuit. That's 582 F3d 432 at 439.

Now, this applies to both conclusions of law and findings of factual findings as noted in Kagerise versus Susquehanna Township School District. That's 325 F.supp 3d 564 at 589.

Thus, for example, this Court previously concluded that loss actual copying at a prior opinion and that copyrighting the com piliation extends to the copy writable pieces of that compilation. That's the opinion at 5.

Given that the parties proceeded to trial and briefed summary judgement, with those holdings in mind it would be the epiphysis of finality to reconsider those now.

That being said, it is not to say the Court can't reconsider things in its prior ruling. The Third Circuit in Pharmacy Benefit articulated when rules could be reconsidered under that rule of practice.

16:38:15 The two most clear examples are Ruten Kristen which afforded them as extraordinary circumstances. Those are decisions clearly erroneous from where they would manifest injustice. That's at 816.

16:38:29 But the Third Circuit also recognizes when new evidence is available or a law has been announced. That's Pharmacy Benefit at 582 F3d at 439.

And, finally, the trial judge, and I'm quoting here, is not precluded from clarifying or

16:38:46 correcting an earlier ambiguous ruling or reconsidering an issue when it appears a previous ruling even if unambiguous might lead to an unjust result. That's again Pharmacy Benefit 439.

So here the Court shouldn't change the

16:39:01 issues that were conclusively decided but where the Court left things open or was otherwise thinking that it would be a better course to change them, you still have the power to reconsider. It's just a question of how do you exercise your discretion to do so.

16:39:15 THE COURT: All right. So that makes

more sense that you recognize ultimately it's a matter of discretion and there's guidance as to that discretion. I was a little puzzled by the way ou phrased it in your reply brief at pages 7 and 8. Protectabiliy, actual copying of the table, whereas you asked for summary judgment on issues that decided unfair use, issues that I decided to leave open.

So is your only response or your main response that on the stuff I left open you can ask me to reconsider, but the stuff that I took off the table I have discretion on but you say the guidance is I shouldn't likely go back on the way that I decided it earlier.

MR. SIMMONS: So the answer is you have the power to do whatever Your Honor would like to do. In terms of how to exercise that discretion consistent with the law of the case doctrine what we would say is for the issues that you conclusively decided, in other words, essentially granted summary judgment on, which were just those narrow issues, that we think should be done. That should be law of the case. But as of things where you said well, we're going to go to trial, I think we'll see what the contours are as we get closer, fair use being a great example of that, those should still be on the table because you never conclusively decided as a

matter of law or a matter of fact those issues you didn't grant summary judgment on here.

THE COURT: Thank you.

Mr. Parker.

16:40:37 MR. PARKER: I feel doubly at a loss here for this reason, two cases were just cited. I don't see those cases in the reply brief, which raises this other argument that it's raised in the reply brief. It's waived. There is a Third Circuit case 379 Fed --

16:41:04 THE COURT: The first time in the reply brief is not proper --

MR. PARKER: Correct. I sent to you an unpublished opinion only because that one is where the Court -- the Third Circuit reversed saying you can't

16:41:17 consider an argument already raised. Now I feel at a loss here myself because I think I just heard two new cases --

THE COURT: Mutually. Is there a procedure impediment to my revising any part of my

16:41:32 prior --

MR. PARKER: No. No. No. Rule 54(b) says you may -- your decision may be revised at any time before entry of judgment.

THE COURT: That's how I read it.

16:41:40 MR. PARKER: Runyan, Williams vs. Runyan,

says, "Although it is often said that the law of the case doctrine does not limit upon the trial court from reconsidering the appellate decisions, this Court has considered to" -- "credential consideration. The Court must explain the reason behind its decision" -- you did it -- "the Court must take appropriate steps so the parties are not prejudiced in reliance."

16:41:54

There are other Third Circuit cases that say the same. I have to also say this: I find this a bizarre moment because the original ruling of this Court was to deny summary judgment. I have no idea what it means to be open or closed.

16:42:10

You made a decision on summary judgment. To me, that would have meant, back in September 2023, you can't reopen. I am not making the argument you can't reopen. I'm just saying, if you really believed you can't reopen, then there is no reason to stop in August of 2024. You have to go back to September 2023.

16:42:25

And there is nothing that says open and close and denial of summary judgment. I don't understand that. That fancy -- that is a pretty fancy argument to weave through what happened.

16:42:41

And so I'm done. I just think if you're going to do this, then we're going back to September 2023, and I will be -- that it was better off

16:42:56

then than it was.

THE COURT: Got it. All right. I don't see that we need any back-and-forth on this.

MR. SIMMONS: No, Your Honor.

16:43:08 THE COURT: Okay. Couple more questions. First of all, we've talked in shorthand about this being kind of like liability versus defenses and damages, but my understanding is -- now I didn't ask you to move on and I know you did move on tortious interference, but

16:43:33 that is a claim that is still open, and presumably would need to be tried.

Mr. Parker, is that your understanding?

MR. PARKER: You told us not to move on tortious interference. And, yes, that would still need

16:43:45 to be tried.

MS. CENDALI: Yes, and we discussed that Thursday Zoom pretrial or whatever, that hearing, that the tortious interference would still need to be tried.

THE COURT: Okay. So that's the first

16:43:57 thing I wanted to clarify.

Second, Ms. Cendali, innocent infringement. Does it matter that the bulk memos didn't bear Westlaw's copyright notice?

MS. CENDALI: It -- my partner, Ms. Chang

16:44:13 will cover that. Thank you, Your Honor.

MS. CHANG: Your Honor, the question is whether it matters that the bulk memos for the copyright notice or not. And the answer to that is, no, according to the plain language of the statute.

16:44:34 So directing the Court to 17 U.S. Code Section 401(d), what the section specifically states is that, "If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant...had access..."

16:44:51 Here, it is undisputed that defendants -- eventually, the defendant was able to obtain limited access to Westlaw. And there are documents showing that there is no dispute of fact they, in fact, had printouts from Westlaw bearing the copyright notice.

16:45:08 I would also direct --

THE COURT: But there is this issue that they had printouts of the 500 opinions, but the headnotes and the key numbers are being claimed separately and those are the items claimed to have been

16:45:23 infringed.

MS. CHANG: And to clarify, Your Honor, what the statute requires is that the work itself bear a copyright notice. The statute doesn't say anything about having the constituent elements -- so involved in

16:45:36 that second step of copyright infringement -- the

statute does not require that the constituent elements that are being excused of copying, that every single one of those bear a copyright notice.

Indeed, that requirement would run afoul of what the plain language of what the statue really says.

16:45:50

And, Your Honor, I'd also direct the Court, there are statements in ROSS's opposition where they admit that Westlaw does bear a copyright notice and that every printout from Westlaw bears a copyright notice.

16:46:03

Additionally, Your Honor, it's not just the cases that they had that -- that had that copyright notice, there were actually search result printouts that bore the copyright notice, and those were circulated internally. I don't want to reference any of the names for confidentiality reasons, but this is laid out in our reply brief on page -- I believe it's 18 and 19.

16:46:15

THE COURT: Okay. Does Mr. Parker or anyone else want to respond to Ms. Chang's factual or legal?

16:46:41

MR. PARKER: So much of their argument is based on activities that occurred after the bulk memo project and are not identified as infringing. Receiving something in the mail which you say, I don't want this,

16:47:01

is actually -- I don't --

THE COURT: The receipt of the 500 opinions, that was before the bulk memo project, correct?

16:47:11 MR. PARKER: It was at the end of the bulk -- I actually don't know that -- the timeline. It was at some point in the process. But, again, they weren't used and they were returned. I don't know how you -- receiving and saying, I didn't want this and I

16:47:26 don't want this.

Also, the copyright is -- and it repeated -- I think it ends, the copyright does not cover government works. So my clients believe they're receiving judicial opinions.

16:47:45 That is not evidence that it is a copyright because the copyright doesn't extend to those judicial opinions.

THE COURT: Right. The tricky thing about Westlaw is at the bottom of the page it says

16:47:52 copyright, but this has no claim to who has covered the works.

MR. PARKER: Exactly.

THE COURT: Ms. Chang, do you want to say anything further?

16:48:07 MS. CHANG: I would just like to clarify

this for the Court. The appropriate inquiry for innocent infringement isn't about whether the defendant actually received the notice. The plain language of the statute is clear. It's whether the published work itself had a copyright notice. That's not disputed here, Your Honor.

16:48:26

THE COURT: Okay. Anything further on that, Mr. Parker?

MR. PARKER: No.

16:48:33

THE COURT: Very good.

Let's talk about the key numbering system in the fair use analysis. I don't know is Ms. Cendali wants to speak to this.

There is a whole lot of briefing, and the

16:48:45

focus of both sides is primarily on the headnotes. Is there anything unique about the way the key numbers were used that bears on the fair use analysis?

MS. CENDALI: The fair use analysis is -- we were not intending to in any way limit or say that

16:49:12

fair use should have some special lesser or greater with regard to the headnotes. The West Key Number System is a key part of our copyright, which as you heard Mr. Simmons describe was what was walked through to get the headnotes, to get the questionnaire and some

16:49:35

pairings, but also to get coverage of the -- to make

sure that ROSS was replicating us in getting full coverage.

That is the -- one of the hearts of our work that people know of us for, the West Key Number System. So therefore, when you look at the different fair use factors, all the different arguments with regard to the West Key Number System, are even stronger, the least bit strong, especially when you talk about the nature of the work that is a incredibly innovative, ever-changing taxonomy.

And that is -- that's what I want to back to something that's a big factor too. Part of the reason Factor Two is, which in our view, is that we win, is that the nature of the work is why they copied it. In other words, you know, sometimes people copy for other reasons and the nature of the work isn't as important because -- because, you know, it's kind of the tail wagging the dog.

But here, the nature of the work is why they copied it, because they wanted those pairs, they wanted to take advantage of the West Key Number System, and those pairs populate those relationships.

THE COURT: Got it.

Mr. Parker, would you like to respond?

MR. PARKER: You know I do.

So first, I'm not even sure that there is an infringement claim on the key numbering system at all as to ROSS. We can just start there. They don't appear in the memos, they don't appear in the metadata. When
16:51:18 they keep talking about coverage. In Krein, they have 5,000 --

THE COURT: The key numbers themselves don't, but the phrases associated with key numbers, don't they show up in the metadata.

16:51:31 MR. PARKER: No. I mean, here is the difficult part, one of the key numbers is civil procedure. I mean, we use that. You can't help but use it. Another is criminal law, another is administrative law. To say that you can't use those terms because they
16:51:47 are the key number system...

THE COURT: Got it.

Now, Mr. Simmons was saying, Well, the key number system structured the way they did their searches to make sure they covered all the subparts and
16:51:59 the subquestions.

MR. PARKER: I got you. There are 5,473 headnotes associated with key numbers that they claim infringe. That's another 21,000. Once you get rid of all the -- it's 5,473 key numbers associated with those
16:52:18 things. In total, there are 100,000 key numbers.

That's it. I mean, far from trying to replicate, you can't replicate by having less than 5 percent of the entire key number system.

And if you look, they're all in the Krein exhibit, and -- that the reference is to our ROSS motion at page -- I think I put 7. It doesn't come close to covering the 140-some-odd topics. It does not come close to drilling down into any one particular topic.

So it is -- it is -- and, again, when you look at output, there is no key number system. None. And the cases aren't organized by what type of case they are. There is no evidence that when you did a query somehow these cases were organized in some fashion that would even come close to replicating the key number system. Just nothing.

So from a fair use analysis, even if you assume that somehow there were 5,473 key -- key numbers somehow associated -- which our clients didn't see, didn't have. You can look at the questions and the memos, and I would challenge anybody to say, find me the headnote that this is associated with. Because also, the headnotes and the key numbers, they get really finely grated down. I mean, it's not just three numbers, it's, you know, one with a key, and then 5-875.

No one is going to know how to work

backward in time without having the actual headnote. There is no evidence we had the actual number. So that's what's confounding to me a little bit about this --

16:54:21 THE COURT: No, I get it. If I were Ms. Cendali, I would respond, the test isn't that you would be able to reverse engineer something, the question is are you learning something about the relationship between the headnote and the text that it

16:54:37 refers to, or the question and the answer.

MR. PARKER: I think they are two different things. The first is to respond that we are trying to replicate the entire key number system, and that is literally impossible given the facts of the

16:54:49 case.

THE COURT: It's not. Okay.

MR. PARKER: The second piece is, we did not use the key number system. That's not our output. We don't use the materials at all. So even if somehow

16:55:00 you want to say we tried to figure out a way -- I don't know how you do that when you don't have everything to relate back to -- you don't have a coherent structure. That is all ripped out in the featurization.

These aren't just extra strange words,

16:55:21 but -- when they're asking what the question and answer

is, again, we're going back to some idea that there was a link, and there is literally no link. And by the time you're done, the link is completely eliminated between answer and question, which then confounds how is that a key number system, and if the key number system would help you in any way.

That's the argument. And we're talking fair use so you do look at the final result and you said, Okay, I don't see anything here.

THE COURT: Okay.

MS. CENDALI: May I respond?

THE COURT: Yes.

MS. CENDALI: Two points. My friend mentions that, Oh, well, we use criminal law or something like that. The 25,000 memos are far more in detail than just criminal law and civil procedure, all of which copy and all of which came from the key number system.

You heard Mr. Simmons say that's what they did, they walked through the West Key Number System.

But the question on fair use isn't infringement, what was copied, but what was the purpose of it. And I go to their own expert, Mr. Branting, at Exhibit 23 of the first Means declaration.

And what he said in paragraph 14 is, "The purpose of developing a large training set was to ensure that the ranking algorithm is trained on better and worse answers to a full range of representative" -- question mark twice -- "questions in different areas of law are often expressed using different language so this diversity of language and expression can be achieved by developing questions for diverse cases, as done by ROSS."

When you read Exhibit 23, he admits that the West Key Number System that was being used is part of the training. And I think that -- I'm getting a little bit concerned about, again, losing the forest for the trees, like Mr. Parker mentioned, again, oh, well, featurization. That is, like -- means nothing. What matters is what the purpose was for the copying.

You can't blind the Court by science. And if it meant nothing, then the whole purpose of why they trained, it's inconsistent. The whole point is they wanted these pairs. They said they wanted these pairs. That's the whole purpose of the training.

So if they're really standing here saying, "Well, he just took everything apart, it meant nothing," that's not consistent with their experts said, what their fact witnesses said, or what they said their

purpose was. This wasn't a situation of learning about language. This was trying to figure out how to answer legal questions by copying Westlaw's editors.

THE COURT: Anything further?

16:58:22 MR. PARKER: Yes, briefly.

I think there are -- let's just start with purpose, because it's a bit confounding. We certainly needed to know what the language of the law was. We needed to know the good, the bad, and the

16:58:45 indifferent. So every memo did not just simply match a great question to a great answer.

And the paragraph 14 that was just read establishes just that. We needed to have bad answers and good answers; and none of these answers were mapped.

16:59:02 Why did we go to a legal vendor to create memos? Because we needed legal memos to create. We did not ask them -- we are going back -- just to use Westlaw, we asked, Can you use Lexis, Westlaw, or in some reputable source.

16:59:19 So the purpose here -- and this is the key because the purpose was not to suck in the entire key number system, because that didn't happen. It just didn't happen.

The purpose was to get a question, to get

16:59:36 judicial quotes, some of which were good -- I mean some

of which were great, but the vast majority were not great. Of the 150,000 different quotes, 125,000 were not great quotes. So there's not -- it wasn't mapping. And, again, when you look a lot what they received then -- I mean, you can look at the topics and see that they're by no means extensive; 5,000 out of a hundred thousand topics is by no means extensive. It is not replicating Westlaw. It truly is not.

17:00:02

THE COURT: Okay. Thank you.

So I have one more question about citing sealed documents. We have a sealed joint pretrial order. It attaches a list of uncontested facts, D.I. 619-1.

17:00:18

Can the parties get together and provide a redacted version of that? You know, I am not intending to go and quote the names -- you've been careful during this hearing to avoid naming particular lawyers, particular vendors, et cetera. It's not that kind of thing I want to cite it for. But there's a number of facts, the uncontested facts, just to help lay out the story, explain to you and the public and the Court of Appeals and everybody else what was going on.

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Can the parties both work together to provide a -- something such that the bulk of these items is visible and only portions are redacted, or otherwise

17:01:14

discuss with me how I might use some of these uncontested facts in my summary judgment?

MR. PARKER: We are going to opt for Door Number 1, at least on this side of the table, and discuss either redact or completely unconfidentialize certain of the claims, but we can work together.

17:01:32

MS. CENDALI: We are obviously happy to do that, Your Honor, but sometimes what judges do -- just for you to think about, is sometimes they'll issue an opinion to the parties --

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THE COURT: And offer the opportunity for redaction. And so, look, that is an option. I don't think I'm even going to need to go there in a step. I think it will simplify things if you guys could try --

17:02:04

And I -- I've got an obligation to look out for the First Amendment right as that with regards to the public --

MS. CENDALI: And I can't dispute that.

THE COURT: Right. So why don't you two work together, come back to me, you know, ten days, with a proposed, here is the stuff in here that we really think needs to remain under seal. There will be a version of it filed under seal, there will be a redacted version that's public.

17:02:14

17:02:27

I'll see -- it isn't likely that I can

write the whole opinion using the redacted version. If there are portions otherwise then I would provide the usual, here is a version released under seal, you guys have 14 days to propose redactions to it. I am trying to move the case along so I think that would be helpful if you could work on that.

17:02:43

MS. CENDALI: And that's fine, Your Honor.

And to be clear, we were erring on the side of caution in not naming names, but I think that our particular view is there's -- the movers and shakers name names. I think that they are already in the complaint and public knowledge, and I think that would be fine in the judicial opinion.

17:02:51

17:03:10

THE COURT: Okay. If you guys can agree upon that. I mean, I tend to agree. The bulk of this stuff can be figured out from the complaint. I have no reason -- I avoid dragging in or sharing people in the opinions, it's just distracting. There ought to be a way to do this that allows me to tell the basics of the story that I need to in order to set stage.

17:03:27

Okay. Logistics of trial. We will hold the May 12th week as firm. The only problem with the week of May 5th sounds like the unavailability of your expert. So my hope is that we can schedule a pretrial

17:03:48

conference. The dates leading up to the trial that involve, you know, a Zoom conference going over jury instructions and motions in limine and things, and then some kind of in-person meeting sometime during the week of May 5th to hammer out the last-minute things that happen.

17:04:09

So I ask that you -- let's get some dates on the calendar for these things and hold them in your busy schedules. It sounded like March was busy but we were all able to find some time in early April before we get into the Easter/Passover week for pretrial conference, and then hold another date a few business days before the trial actually starts for something in person in Delaware.

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17:04:40

So propose some dates, propose a schedule that -- of what that will look like. Obviously, this is all on the assumption there is a trial. But it's better to be prepared because your schedules and mine fill up so early, get so busy, better to put markers down now.

17:05:00

Unless I grant summary judgment to ROSS, we are going to have a trial on something and let's talk about making that trial manageable for a jury. Again, just looking down the road, it is not going to be in the opinion, but it is the kind of thing to start thinking about because I am going to try to hustle this opinion

17:05:16

out in January in plenty of time for the parties to gear up. And if they decide they want to proceed to trial, they have that right to do, and we will do it on this schedule.

17:05:31 I am not going to grant continuances or delays. We will try it May 12th.

Thomson Reuters is asking me to grant summary judgment on copyright direct infringement on the premise that a subset of the total headnotes in the case

17:05:44 clears the administrative threshold. So what I want to know is, if I did that, what will the trial look like?

Is Thomson Reuters going to be seeking damages on a compilation copyright theory instead of on an individual headnote basis? We had a little bit of

17:05:58 discussion on damages models here. Is that right?

Are we going to be getting into per headnote? You know, I heard something different from Mr. Parker than I heard from Thomson Reuters.

And does either side think the jury is

17:06:15 going to still need to make determinations on individual headnotes for damages purposes? So we're going to have some, okay, there's partial summary judgment on some liability, but there is going to be, in essence, further liability determinations both on tortious interference

17:06:29 and on whatever headnotes were not resolved as a matter

of law in the summary judgment opinion.

And if we do that, are we going to batch the headnotes in some way? I have not gone and looked at the Docket D.I. 690, these sheets 6 to 11. Batching them those ways, batching them in other ways.

17:06:46

I would like to hear from someone on the Thomson Reuters team what your approach is to these questions, and then let me hear from someone on ROSS's team and maybe we can figure out what is agreed upon and what you guys need to meet and confer about and where you affirmatively disagree about at this point in time.

17:07:03

MS. CENDALI: Your Honor, to suggest it maybe would be easier for us to do that because I don't think any of us have really come to full terms on this until we see Your Honor's opinion, and maybe it makes sense for once we see the opinion to kind of work out a plan with ourselves and with you as to how to do that.

17:07:20

THE COURT: All right. You have a big trial in March but you would think that if I got you an opinion in January that there been plenty of time for both sides to meet, confer, hammer out a schedule in February such that we would look ahead 3 months to May.

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MS. CENDALI: Absolutely. It's in everyone's interest.

THE COURT: Mr. Parker.

17:07:54

MR. PARKER: Agreed. My head exploded when you asked those questions.

THE COURT: All right.

MS. CENDALI: I join in Mr. Parker's statement.

17:08:09

THE COURT: All right. Well, that makes sense. Let's take a recess of 5 to 10 minutes. I need to confer a little bit and think about what additional items I have, whether we need to reconvene tomorrow or not. So let's recess.

17:08:32

MS. CENDALI: For what it's worth, Your Honor, as you think, obviously we cleared these days to be here with you, but Mr. Parker and I did agree on one thing which is since none of us live in Philadelphia, if we're able to get things done today, we would prefer it.

17:08:48

THE COURT: You would both prefer that, even if I if need to hold open the possibility that oops, let's do a zoom or something else tomorrow for some loose ends.

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MS. CENDALI: Well, we will do whatever you would like, but clearly we could do that or whatever Your Honor would like. That's our preference.

THE COURT: Very good. Let me consider what we can do.

17:09:12

(Brief Recess.)

THE COURT: We can let you go home. I'm sure there are going to be some -- you are going to get me some of the spreadsheets in electronic, native, Excel format. There are going to be some documents when there was a reference to such and such, what does that D.I. translate into. A lot of that can be done by e-mail. If there's a need to do some of it by zoom we can. But I think we should just wrap it here and the Court will get hard at work.

Because I think the sooner I can get you an opinion -- and as I said I don't think it's realistic to get the whole thing out in December, but I think I can get you something in January, not at the very end of January, I am going to shoot for the middle of January, in time such that I will expect you to come back with some concrete proposals in early February about what the next steps are.

But I also am going to need from you -- what were the other action items? Excel, can we get those in 7 to 10 days?

MS. CENDALI: You should -- in the best senior partner's statements you should get that by tomorrow, Your Honor.

MR. PARKER: Best seated partner

statement Crinesha will be the one who approves or not.

THE COURT: That's great. You guys are going to agree upon some dates that we are going to hold for a Zoom pretrial conference in April and in-person -- the 2 days -- what would that be May 8th, 9th, something like to before the trial itself starts because I find it is helpful to wrap up as many loose ends so that when we're picking the jury and all that we hit the ground running.

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17:12:39

So I would hold -- are the 8th and the 9th the Thursday and Friday of the week before trial?

MR. SIMMONS: Yes, Your Honor.

THE COURT: Okay. So let's hold both of those on the calendar. We could consider there is the possibility of doing jury selection on the 9th. There is the possibility -- if they're held on people's calendars we can -- we will have some estimates after the opinion comes out, is there a trial. If there's a trial what issues are on the table for the trial. What is the proposal of how many trial dates are required?

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17:13:08

We will at that point engineer how is this going to work, how is it going to sequence, how is it going to fit into the ability of the experts, et cetera. All right. Very good.

By the way, I want to commend you all.

17:13:19

You have been very well prepared. There's a lot of paper. There's a lot of filings in this case. You marshaled them very well. There's been a big team effort. I think we see of course the glory that Mr. Parker and Ms. Cindali have the lead roles here but all the lawyers, the paralegals, the secretaries, the Court expresses its gratitude to you all for a job well done. And whatever happens here it's not going to be because a lack of preparation, it's going to be because you teed up the best arguments on both sides here to help the Court.

17:13:36 17:13:55

And you very wisely you have avoided the trap. So let me say this in the presence of the clients. There are clients who think they want their lawyers to be pit bulls and fight every last footnote and every last thing and I will tell you that your lawyers have done you a great service by not squandering the credibility on side issues and tertiary things because that is penny wise pound foolish approach. And the amounts that you are paying your lawyers for their services have been well-spent in terms of good disconcerting judgment and strategy, tactics on what to focus on and the Court is grateful for it.

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And with that said we will adjourn. And as I said I ask the parties to work together, split the

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if cost, get the Court a transcript. It will be important for us to get going.

MS. CENDALI: Thank you, Your Honor. Thank you for so much time today.

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kim L. Haley, CSR, CRR, RPR
12/6/2024

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